UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DYAMONE WHITE; DERRICK SIMMONS; TY PINKINS; CONSTANCE OLIVIA SLAUGHTER HARVEY-BURWELL — PLAINTIFFS

VS. — NO. 4:22-CV-62

STATE BOARD OF ELECTION COMMISSIONERS; TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI; LYNN FITCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MISSISSIPPI; MICHAEL WATSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF MISSISSIPPI — DEFENDANTS

NON-JURY TRIAL
VOLUME 8

BEFORE HONORABLE SHARION AYCOCK
UNITED STATES DISTRICT JUDGE

Oxford, Mississippi
August 15, 2024

(APPEARANCES NOTED HEREIN)

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(CALL TO ORDER OF THE COURT AT 9:04 A.M.)

THE COURT: Good morning, everyone.

So we want to get started this morning with your arguments, the motion made by the defendants yesterday afternoon.

You may proceed.

MR. WALLACE: May it please the Court.

I haven't made a directed verdict argument in so long I don't even know what you call it anymore, but my colleagues tell me it's Rule 52(c). Whatever you call it, it's the same principle it's always been. I have got to show you that, on undisputed evidence, their issues are flawed and entitle us to judgment in the case.

There are two of those. The first is that a district with a Black voting majority is not entitled to relief under Section 2. And the second is relief can't be granted under Section 2 without proof of depressed minority political participation.

Five years ago, the Fifth Circuit took both of those issues *en banc* in the *Thomas vs. Bryant* case to try to straighten them out for this circuit. In oral argument, the appellees stood up and announced they would like to have their judgment vacated and their complaint dismissed, which was a strange thing to happen in an oral argument. And that's why the Fifth Circuit has not answered those questions and have

left them for Your Honor this morning.

Let me address the first one. The Supreme Court, in the *Bartlett* case, says that you only get to the *Gingles* calculation where an election district could be drawn in which minority voters form the majority, but such a district is not drawn. That's 556 U.S. at 18. The recent *Allen vs. Milligan* case says basically the same thing.

So the question is whether additional minority -- majority minority districts can be drawn, 599 U.S. 31. They both say, if you have already got a minority district, you never get started with *Gingles*.

Plaintiffs have stipulated that the census data shows this to be a 51 percent citizen Black voting-age majority district. That means the proportion of the eligible voters in the district is 51. They can't deny 51 percent is enough to satisfy Section 2.

In the legislative redistricting case, they persuaded the three-judge court to create a new senate district in Northeast Mississippi, which is only 50.9 percent. This district is bigger than that. If 50.9 percent is good enough, so is 51.

On cross-examination, they tried to get Dr. Swanson to admit that there may be enough former criminals running around to bring this down below 50 percent. But he didn't agree with them. He pointed out that -- when Mr. Savitzky was deducting

Black -- potential hypothetical Black felons from the numerator, he was forgetting to deduct them from the denominator. And when you deduct them in both places, you are still up above 50 percent.

They don't have a single witness who has sworn to this Court that this is a Black minority district. Mr. Cooper said he didn't do the math. Nobody else did the math. This is clearly a Black majority district.

Now, the Fifth Circuit in the *Salas* case says it is possible that a district in where minorities form a majority of the voters could go forward under Section 2 if you demonstrate that the majority is illusory. That's the language the Fifth Circuit used in *Salas*.

In that case, Hispanics in Texas had a registration majority, but they argued that their majority was illusory because those folks wouldn't come out and vote. This is what the Fifth Circuit said.

"Obviously, the protected class is not entitled to Section 2 relief merely because it turns out in a lower percentage than Whites to vote. Further, the high incidence of Hispanic registration in the district is persuasive evidence that Hispanic voters are not deterred from participation in the political process because of the effects of prior discrimination, including unemployment, illiteracy, and low income." That's 964 F.2nd at 1556.

So all of those things are bad, but if you have got a voter registration majority and you don't use it, you are not entitled to relief.

Now, *Shelby County* found that Black registration in Mississippi exceeds White registration by 3.8 percent. And the CPS docket -- the CPS numbers, which we have admitted, show that that carries on today. No witness has said that Blacks overreport their registration. It's a different question did you turn out on a particular day as opposed to what you usually do.

Your Honor usually sees that evidentiary problem in reverse. Somebody shows up and says this is what I usually do in order to prove what they did do on a particular case in question. This is the only -- this is the other direction. They say, "Well, this is what we did in 2020 to prove what they usually do." Mississippi State asked the question, and Blacks exceed Whites in saying that they usually vote.

So the parity that Judge Lee found 25 years ago between Black and White participation still existed under *Shelby County*. It still exists today. And under *Salas,* because Blacks have a lead in registration, the fact that they are not getting out to take advantage of it is not a Section 2 violation.

The second issue is whether they can recover where there is depressed -- unless there is depressed Black

participation. And that language comes from the senate staff report.

I think *Salas* decides this one too. Where you have a Black registration majority, the failure to turn out is not attributable to past discrimination that depresses turnout. You have got the -- you have got the majority. You don't use it. The participation is on the front end. Are you registered, and can you do it? Not whether you bother to do it at the end of the day.

So -- but if you get to the turnout issue, if you get past *Salas* and say, "Well, I'm going to look to see what the turnout is," I don't think they have enough proof. The Fifth Circuit in both *Rangel* and *Fordice*, cited in our briefs, say that one election, in this case, 2020, isn't enough to establish a Section 2 violation.

And Dr. King quite candidly agreed with that yesterday. What he said is, "In political science, we don't make a lot of hay out of one election." In voting rights law, we don't make a lot of hay out of it either. And all they have got is one election.

So the Fifth Circuit and their own expert say that's not enough. They haven't proven depressed participation, and for that additional reason, we believe defendants are entitled to judgment.

We thank the Court.

THE COURT: Thank you. Any argument on behalf of the plaintiffs? Response?

MR. SAVITZKY: May it please the Court, Your Honor.

THE COURT: You may proceed.

MR. SAVITZKY: Your Honor, a few points in response to Mr. Wallace, but I think the first thing I would say is, having heard evidence over the last two weeks, the rule allows the Court to reserve on the motion and proceed to close the case. I think that's standard and typical.

And I think it makes particular sense in this case where, under Section 2, we make an intentional local appraisal. We look at past and present reality, and in the end, we talk about it and we think about it and make a decision based on the totality of the circumstances.

I understand Mr. Wallace is offering a legal argument and arguing that there's some legal ground to not address the facts in the case. I don't think there is any legal basis for that position.

Certainly, if you look at *Bartlett Against Strickland* or you look at *Ashcroft* or any of the cases that talk about what it means to have a Black voting-age majority, what *Bartlett* says is, when you draw an illustrative plan for *Gingles* 1, we look at the illustrative plan. We say, Is the illustrative plan over 50 percent plus one census Black voting-age population; right?

On *Gingles* 1, we are looking at the illustrative plan. We are not asking about the existing district. We are not measuring the BVAP of the existing district. There is no case that does that. There is just nothing in the law that applies to that.

On *Gingles* 1, we look at the illustrative plan. And what *Bartlett* said was plaintiffs can't come in and offer an illustrative plan that is 40-something percent, which is not what is happening here. All of our illustrative plans are over 50 percent.

Now, on *Gingles* 3, now we look at what happens with the existing plans. And the question isn't what's the population composition of the district. The question is whether Black voters, despite voting cohesively, are usually defeated in light of White bloc voting against the preferred candidates. That's how we consider the effectiveness of the Black population in that district, whether it's a BVAP plurality district or a CVAP majority district.

And, again, the numbers being referenced by Mr. Wallace, CVAP, are estimates. They are not the census estimates that the cases require us to use when we think on *Gingles* 1 about the population of the district. And, again, we look at the illustratives there.

But *Gingles* 3 is where we look at the existing district, and there we are looking at election results. We are

not looking at the population of the district. And *Salas,* as far as I can tell, doesn't say anything to the contrary.

We talked about it a little bit in our pretrial brief. But it -- it doesn't contain any such rule that, where there is some numerical characteristic of the existing district, then there is a legal defense and we don't engage in the totality of the circumstances inquiry. Nothing like that.

And *Salas*, as I understand it, involved a case where there was a Black registration or a minority registration majority. There is no evidence of that here. Rather, what the evidence is, is that while the district -- District 1 -- current District 1 is Black voting-age plurality and just over CVAP majority using those CVAP estimates, once we start to think about the tens of thousands of Black voters -- Black potential voters who are disenfranchised based on a disqualifying conviction, that number goes down.

Mr. Cooper testified unequivocally that it's going to go down under 50 percent. We can talk about that in closing.

Dr. Swanson didn't disagree, and I have to tell you, as far as I understand how you do the extremely simple calculation that we walked through when he was on the stand, you don't subtract from the numerator and the denominator. You keep the denominator the same. And that's what he did when he did his adjusted calculation, and then his arithmetic started to change when he didn't like the results that we were getting.

So, Your Honor, I don't think there is a legal argument here to walk away and not do the analysis that Section 2 requires because of some characteristic of the existing district. You need to look at the elections, look at the results, look at the effects for Black voters, which is what Section 2 requires.

So unless the Court would like to hear more on any of the points that Mr. Wallace raised, I look forward to presenting closing argument.

THE COURT: Thank you.

Have any rebuttal, Mr. Wallace?

MR. WALLACE: One thing, Your Honor.

THE COURT: Thank you.

MR. WALLACE: Your Honor is going to have to read *Bartlett* and *Allen* and *Salas* to see what they all mean, and I'm not going to try to tell you this morning, but I will remind you of one fact.

Mr. Cooper said he did not do the math. It was his speculation that there may be enough released felons wandering around the third district. Didn't have any evidence of where they were or whether they were still alive or how many, and he speculated that they might bring it down below 50 percent, but he admitted he didn't do the math.

We have done the math from the census data. It's 51 percent. And unless they can find somebody to say it goes

below 50 percent, we have got a Black majority district here, and I think under *Allen* and *Bartlett,* you stop right there.

Thank the Court.

THE COURT: Thank you.

Okay. Mr. Shannon.

MR. SHANNON: Good morning, Your Honor.

THE COURT: Good morning.

MR. SHANNON: Good morning. Before the defense rests, we do have one additional evidentiary submission to make.

THE COURT: Yes, sir.

MR. SHANNON: At this time, the defendants would offer into evidence what has been marked for identification as DX-14. That is the U.S. District Clerk's file for the case of *Magnolia Bar Association, Inc. vs. Lee* in the U.S. District Court for the Southern District of Mississippi, Number J90-0413(b), as in Bravo.

Your Honor, DX-14 is the complete court file for the Southern District Clerk for the first time this case was tried back in February of 1992. It is relevant to multiple issues of fact delineated in the pretrial order and raised during the course of this trial, including the defendants' view of the third *Gingles* precondition as well as Senate Factor 9 specifically as it relates to the policy justifications for the east/west configuration of the Mississippi Supreme Court District lines.

Your Honor, we would offer DX-14 pursuant to the hearsay exception for ancient documents set out in Rule 803.16. And, Your Honor, DX-14 is authenticated pursuant to Federal Rule of Evidence 901(b)(8), the court file being more than 20 years old and no objection being raised to authenticity in the pretrial order.

THE COURT: Any objection?

MR. SAVITZKY: Yes, Your Honor. We would object. We don't think that the ancient document exception can apply to get this entire 900-page case file into the record here. A few points, just at a high level.

This is a trial record from a different case. It contains declarations by witnesses, expert reports by experts who weren't disclosed in this case, didn't testify, weren't subject to cross-examination. So it's clearly hearsay. And the underlying case file is hearsay that was created for purposes of litigation.

Now, the ancient documents exception can apply -- and this is a sort of a chain of hearsay issue -- can apply to the first level, but what the cases say -- we would point the Court to *Hicks Against Charles Pfizer*, which is a decision from Judge Crone in the Eastern District of Texas who cites additional authority. That's 466 F. Supp. 2d.

Even if a document -- and here I think the document we are talking about is the clerk's docket and then all of the

other subsidiary documents that are attached to it. Even if a document qualifies as ancient under Rule 803.16, "other hearsay exceptions," in other words, not the ancient document rule, "Other hearsay exceptions must be used to render each individual layer of hearsay admissible."

So the docket sheet is one thing, but once we get down below the docket sheet and start talking about statements from witnesses, expert reports, those would be some "other hearsay exception," and there is none that applies in this case. This is testimony that wasn't presented. Defendants obviously had a chance to present witness testimony from additional experts, from historians, from policymakers. They presented the case that they presented.

And so we don't think that the ancient document exception applies, and, accordingly, there is no exception to hearsay to let in this 900-page collection of documents.

MR. SHANNON: Your Honor, may I respond?

THE COURT: You may.

MR. SHANNON: Your Honor, as we set out in the pretrial order and also in our opening statement, part of the defendants' theory of the case is that the case before Your Honor is a needless do-over of prior litigation.

In the *Magnolia Bar* case, Judge Barbour held that the current supreme court lines are lawful under Section 2 of the Voting Rights Act. Judge Barbour's reported opinion in

Magnolia Bar is set forth at 793 F. Supp. 1386.

Your Honor, the court file being offered as DX-14 is the Court record providing the factual basis for Judge Barbour's ruling and his related findings. It is relevant for two particular reasons.

Number one, it is probative of *Gingles* 3 regarding the effectiveness or the lack thereof of White bloc voting in the Central Supreme Court District.

Moreover, Your Honor, number two, it is probative of the fact that the state's policy underlying the creation and maintenance of the east/west configuration of the supreme court districts is not tenuous. Rather, the underlying state policy was to intentionally make the districts more diverse for the purpose of fostering judicial independence.

Now, Your Honor, that goes to Senate Factor 9. Specifically, the report and the trial testimony of Belhaven history professor Westley Busbee, who testified in that case. And it's relevant to refute the testimony that Dr. King gave yesterday when he said that he disagreed with Judge Barbour's findings on this point.

Your Honor, as to the hearsay objection, I don't believe there is anything that qualifies -- as Mr. Savitzky has said, that qualifies the 803.16 exception to the extent he has argued that it does. I believe all of these documents were created more than 20 years ago. All of the records in the

court file are documents that were prepared prior to January 1st, 1998, which is the date set forth in the hearsay exception.

That's confirmed by the district clerk's official docket, which appears in DX-14 as Part A of that record, the first eight pages. Therefore, the entirety of the court file is admissible pursuant to 803.16, which is the hearsay exception for ancient documents.

Now, Dr. Busbee's trial testimony -- Dr. Busbee is a Belhaven history professor. That testimony is, likewise, admissible under Rule 804(b)(1) as former testimony. Dr. Busbee recently passed away. We can show the Court the obituary if the Court desires, but I make that representation to the Court. I believe his funeral was last weekend, if I am not mistaken. But he has passed on.

He gave testimony in this case in 1992 that is directly relevant to our theory of the case on multiple issues, and that former testimony was subject to cross-examination by a predecessor in interest to the plaintiffs in this case, who had the same motive to develop that testimony as these folks here do. So I think that qualifies -- at least -- at the very least, his trial testimony, as being admissible as former testimony under Rule 804(b)(1).

So under both of those hearsay exceptions, we believe, number one, that the entire court file is admissible as an

ancient document because everything in there, all of its constituent documents, predate 1998. We believe, furthermore, that Dr. Busbee's testimony, in particular, is admissible under Rule 804(b)(1).

Your Honor, the evidence that we are trying to put in here, specifically this court file, goes to our theory of the case, and Dr. Busbee's testimony, in particular, is the best, most probative evidence that the defendants have on some of the key points in this litigation and, most particularly, the public interest in policy justifications for the east/west configuration of the supreme court district lines.

We believe this evidence is admissible. Respectfully, we believe it would be reversible error to exclude this evidence. We would offer it into evidence.

Thank you, Your Honor.

MR. SAVITZKY: Your Honor, if I may be heard again.

I mean, I understand the argument that was made in opening if this case is a "do-over," but if defendants thought the case should have been tried on that ground, they could have moved for summary judgment.

So having had a trial, evidence needs to be put forward at trial. Defendants could have called a historian. They could have disclosed Dr. Busbee -- I did not realize that he passed away -- as an expert earlier in this case. Litigation has been going on for two years. He wasn't

disclosed as an expert. No other expert historian was disclosed. Defendants chose to put on at trial -- they chose not to move for summary judgment and to put on the case at trial that they put on.

Now, the problem is this is double, triple, or quadruple hearsay. Dr. Busbee's expert report from decades ago is his statement. The document that is being sought to be offered is the clerk's statement. That's -- the clerk is the declarant. So we are talking about multiple different levels of hearsay. The rule against double and multiple hearsay applies.

And, again, as the *Hicks* decision says, and I think the great weight of the case law supports, you need to have a different exception other than ancient document when you're doing double hearsay and you are trying to get some subsidiary document, some other level of hearsay in. It can't be ancient documents all the way down. And there's no exception that's been offered. I think the one exception that Mr. Shannon pointed to was former testimony.

Again, this witness or this expert from another case, not this case, was not disclosed at any point as a witness in this case. It's not properly former testimony. And, accordingly, there's no applicable exception to the double hearsay. The double hearsay rule applies.

We cite on that again, *United States vs. Cervantes*,

107 F.4th 459, from the Fifth Circuit. We are talking about a statement within a statement, and there's no hearsay exception for that second statement.

MR. SHANNON: Your Honor, may I make one further comment, or does Your Honor need to read?

THE COURT: Uh-huh.

MR. SHANNON: I would just say that one of the key issues in this case is what the baseline was in 1992 because that's when Judge Barbour held that the district lines we're fighting about in this trial were lawful under Section 2 of the Voting Rights Act, which is the only claim made in this case. I don't know how this Court is supposed to determine what the baseline was in 1992 without having the evidence that was before Judge Barbour. I don't know any other way to put that evidence in front of this Court beyond -- beside putting in the court file -- the district clerk's file.

There is no argument that this is not an authentic document. And I would take issue with Mr. Savitzky's characterization that the "declarant" is the clerk. The declarant are the folks who generated the records that the court is serving as the conservator of. Those are documents that are preserved by the clerk, but they weren't generated by the clerk. They were generated by the underlying declarants, one of which was Dr. Busbee.

THE COURT: Let me ask you this: What form of

transcription or testimony do you have regarding Dr. Busbee?

MR. SHANNON: The trial transcript from the *Magnolia Bar* case that is contained within DX-14, Your Honor. So is his report, but his trial testimony is in that record, which is former testimony.

MR. SAVITZKY: And, Your Honor, if I may very briefly.

This is a 900-page document. So in addition to whatever trial transcript, as Mr. Shannon says, there are expert reports. There are declarations. And, again, under the rule for each level of hearsay, there needs to be an applicable exception. Ancient document cannot apply to all of the subsidiary documents. And so the Court would need to go through each one of those and --

THE COURT: Let me just narrow the discussion. I am not going to accept the entire court document, the 900 pages, based on a number of arguments, including multiple layers of hearsay. I am focusing on Dr. Busbee.

If -- Mr. Shannon, you think that that concise testimony establishes what you say to me that I have to understand the baseline?

MR. SHANNON: I believe it establishes what you need to have to understand the baseline in terms of the policy justifications for the current supreme court districts.

There are other issues in this litigation, however, one of which being *Gingles* 3, which is whether Whites vote as a

bloc usually to defeat the Black-preferred candidate. And Judge Barbour found in the Central District that that was not the case in 1992. That is a baseline issue that this Court has to have some evidence of.

THE COURT: Mr. Shannon, does Judge Barbour's opinion not help me understand -- I have read it, but is that not the published opinion upon which I should rely? Because it would be just unusual for the Court, so many years later, to be looking at a transcript or the exhibits in another file for purposes of determining this case.

MR. SHANNON: Your Honor, to that, I would say we spent two weeks, and we have heard a lot about Mississippi history from a lot of different experts. I think this is a case that, in large part, turns on history, and, you know, where we start and stop that history is a matter we can debate.

THE COURT: And you think that Dr. Busbee's report is what is the most important evidence in the 1992 case that speaks to the history at that time upon which Barbour relied?

MR. SHANNON: No, Your Honor, I don't. I believe it speaks to the policy justification issue. But there are other issues, such as what -- the White bloc voting issue under *Gingles 3* that Dr. Busbee was not focused on.

So I want to be clear -- and I understand the Court's -- I understand where the Court is headed, but I want to be clear we're not withdrawing our offer of the admission of

the entire DX-14.

THE COURT: Right. I understand.

MR. SAVITZKY: Your Honor, I hesitate to interrupt, but if the Court would hear one more quick point on it.

THE COURT: Uh-huh.

MR. SAVITZKY: I don't think we have heard anything about why this particular testimony that is in the record -- and I think the Court is right. You can look to Judge Barbour's decision and his discussion of these issues, including *Gingles* 3.

But I don't think we have heard anything about why this testimony in the record couldn't have been adduced at trial by an expert, by witnesses who would be put on, in other words, the policy justifications, the history, a historian. I mean, Dr. Busbee was not a policymaker. He was a historian. So another historian could have come and testified.

And so there is no -- there is no particular reason why we -- why we would need to bring in inadmissible hearsay to get at a point that could have been adduced at trial.

THE COURT: Counselors, I think you've done an excellent job of laying out for the Court why it is that the defendants think this is very important that this entire case in 1992 be considered by the Court. And I think the plaintiffs have done a good job in terms of trying to bar that admission. So, on a whole, my gut is that I should not accept this.

I think my job is to focus on the facts as they are today, to focus on the testimony that I have had in this trial. I understand that this trial has dealt with a lot of history, and it's important history to understand, but I don't want to rely upon the underlying testimony of another case.

I will depend and rely upon the opinion of Judge Barbour, with the understanding that that judge, having heard all of these 900 pages of testimony, had the better understanding of what was correct to be heard and what was correct to be considered as part of his decision. And I respect that. I think it is just kind of inherently improper for me to get into the weeds of another case for purposes of deciding this case when I did not hear that testimony and it's not part of the testimony in this case.

My additional concern -- and Mr. Savitzky raised it -- my other concern is, looking technically at 804(b)(1), former testimony, I could accept Dr. Busbee's portion of the transcription because he is unavailable in light of his death in the last couple of weeks, but he was not disclosed as an expert even earlier, prior to his demise. And had he been disclosed and he had since died prior to the trial, I certainly would receive Dr. Busbee's testimony of the previous case so that I would at least have that bit of his history. But he was not disclosed as an expert.

Yesterday I ruled that Dr. King could not be heard on

his opinions regarding 1, 2, and 3 because that had not been disclosed to the defendants that they anticipated that he would be offering opinions on *Gingles* 1, 2, and 3.

And you have been in litigation for about two years, and there have been a lot of disclosures, but in all fairness, I think that we focus on this case, this testimony, and no elements of surprise with respect to now the Court, having heard this testimony, going back and relying upon a 1992 court transcription and file.

So I am not -- I will sustain the objection. I'm not going to receive the court file.

MR. SHANNON: Your Honor, one additional question. I'm not re-arguing. I accept the Court's ruling.

THE COURT: No. I understand.

MR. SHANNON: Mr. Savitzky is correct that this exhibit is around 900 pages -- I think just shy of 900 pages' long. We would like to just make sure that it is preserved for appellate review. We have produced -- provided an electronic copy. Is that sufficient with the Court?

THE COURT: Yes.

MR. SHANNON: If the Court would like, we can file it in the record.

THE COURT: I probably don't want you to file it.

MR. SHANNON: Thank you, Your Honor.

THE COURT: And the clerk's office doesn't want you to

file it.

MR. SHANNON: Understood, Your Honor. Thank you.

(EXHIBIT NO. DX-14 MARKED FOR IDENTIFICATION ONLY.)

THE COURT: Moving on to closing arguments -- do you need to take a break before we do closing arguments? Is everybody okay?

MR. SAVITZKY: I think plaintiffs are ready to proceed, Your Honor.

MR. WALLACE: As is the defense, Your Honor.

THE COURT: Thank you. You may proceed.

MR. SHANNON: Your Honor, as a matter of procedure, the defense rests. I don't think we have --

THE COURT: Thank you. I assumed as much, but thank you for clarifying in the record.

MR. SHANNON: Your Honor, and we would renew Mr. Wallace's motion as a matter of procedure that he made earlier.

THE COURT: The Court is going to take it under consideration. I'm not ruling at this time on that motion.

MR. SHANNON: Thank you, Your Honor.

MR. SAVITZKY: Excuse me, Your Honor. Before I start, if I may hand the Court a copy of the PowerPoint in this case.

May it please the Court, Your Honor.

THE COURT: You may proceed.

MR. SAVITZKY: Your Honor, Ari Savitzky for the

plaintiffs Dyamone White, Derrick Simmons, Ty Pinkins, and Constance Slaughter Harvey-Burwell.

I reserved, I think, ten minutes for rebuttal, and I hope that's not wishful thinking. It may be. There's a lot to cover today. We'll see how much time I have left.

THE COURT: Let me ask you about that.

MR. SAVITZKY: Yes.

THE COURT: I'm not trying to extend this any further than need be, but I do want to hear what you both have to say, and that -- closing is important for me to realize what you perceive to be the true highlights.

Now, we're going to look at all of this for the next two months, but I don't want to cut you off if you still have things to be said. And I don't want to cut you off, Mr. Wallace, if you still have things to be said.

So I know that y'all have agreed on some timelines. I'm going to be lenient.

MR. WALLACE: Yes, ma'am. I understand that. I don't think I have ever talked 75 minutes in my life but --

THE COURT: I bet you have.

MR. SHANNON: That's debatable, Your Honor.

MR. WALLACE: My wife might support you on that. Not at a stretch, Judge. I run out of gas. But we will talk as long as you want to hear us.

THE COURT: Well, I -- and then I will tell you I do

have some questions for you this morning too, but I want you both to make your closings, and then I will follow up with a few questions that we have thought about over the last few days.

You may proceed.

MR. SAVITZKY: Thank you, Your Honor.

And before I start the argument, I want to make just a few quick points of acknowledgement.

First of all, I want to acknowledge Ms. White and Senator Simmons, who are in the courtroom with us today, and say that it's a great honor to represent them and as well as the other plaintiffs in this case.

I want to acknowledge and thank the court staff, especially Ms. Wright and Ms. McLarty, for their tireless efforts over the last two weeks. And I know I can speak a little fast, and others may speak a little fast, and we appreciate all that you do.

I also want to thank opposing counsel for their civility and professionalism over the course of this trial and this litigation.

Your Honor, over the last two weeks, we have heard about county splits and compactness scores, ecological inference, CPS, the ACS, the CES, the census. We have heard about race and political behavior, racial appeals, racially-polarized voting. We have heard about the many ways

that history projects itself into the present, the ways it can shift in its course.

And this Court is tasked with considering the fairness of the Supreme Court lines in Mississippi for Black voters today, whether they provide Black voters an equal opportunity to participate and elect candidates of choice to the Mississippi Supreme Court today. And while the question is complex and it's very important, the evidence, based on the law, the answer is clear. They do not.

The district lines enacted back in 1987, when some of us were children and some of us were not yet born -- one of the plaintiffs was not yet born -- dilute the voting strength of Black Mississippians. They result in the denial of that equal opportunity that the law requires. And the evidence we've presented in this courtroom over the last two weeks proves that.

We have proven that, today, Black voters could easily be included in a reasonably configured Black majority supreme court district made all of whole counties. And, instead, the lines that are in place fragment Black voters in Mississippi and they crack the Mississippi Delta.

We have proven that, today, stark, pervasive, racially-polarized voting patterns mean that Black voters usually lose in state supreme court elections.

We've proven that, today, with respect to the supreme

court lines, the political playing field is not equal. And that reality is demonstrated by the stark and persistent underrepresentation of Black Mississippians in the state's highest court.

We have proven that, today, the justifications that once underlay these lines no longer apply. We have proven vote dilution under Section 2.

This is an important case, Your Honor, as you said. What we have heard from witness after witness is that representation matters, especially in high offices and very much including on the bench. We have heard that the current lines don't provide equal opportunities or fair representation, equal opportunities for Black voters and for the next generation of leaders in Mississippi.

So this case involves Mississippi's past. It's very much about Mississippi's present, about whether these lines in their operation in politics today result in vote dilution. But as we have also heard over the last two weeks, it's about the future as well.

So how do we answer such a large and important question? We start with the law. We start with *Allen Against Milligan*. We start with controlling supreme court precedent -- *Allen* and the Fifth Circuit's application of it in *Robinson*, Chief Judge Dick's application of it in *Nairne*, the three-judge panel's application in the *Mississippi NAACP* case in Jackson.

That's how we answer the question. We look to the law.

So what I want to do is go through the elements of the *Gingles* vote dilution standard -- it's reaffirmed in *Milligan,* and it's applied by all of those courts -- and show how we have proven our Section 2 claim as to these supreme court lines, brick by brick, witness by witness. And along the way, I want to take on some of the arguments the defendants have made and that I think they are probably going to make.

So let's start with the *Gingles* vote dilution framework. The *Gingles* framework is how we carry out Congress' command to prohibit voting schemes, including district lines, when they have discriminatory results, regardless of the intent.

And I want to nip something in the bud right here. It was suggested in opening that the language in the statute "on account of race or color" implies some requirement of intent or purpose. And it doesn't.

This is the supreme court majority in *Milligan.* Quote, "We have reiterated that Section 2 turns on the presence of discriminatory effects, not discriminatory intent. And we have explained that it is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color and not to connote any required purpose of racial discrimination." That's *Milligan* at 599 U.S. 25.

And while we are on the statute, let's actually do one more. It was suggested in defendants' opening that, once a plaintiff proves that unequal opportunity on the totality of the circumstances under subsection (b) of the statute, they have to go back. I think Mr. Shannon said you have to go back to section (a) to do something else. And that's wrong. It's not what *Milligan* or any of the cases say. It's also not what the statute says.

The statute says that, Once you make the required showing under subsection (b), quote, "A violation of subsection (a) is established," closed quote, you don't go back to subsection (a) for anything. You prove the totality of the circumstances, and you prove a Section 2 violation. It's a results test. If the result of the challenged lines is unequal opportunities for Black voters, the test is met.

And let me nip just one other bud while I'm at it. Another argument we are probably going to hear from the defendants is Section 2 doesn't apply in judicial cases. Federal courts in the state have been applying the VRA in judicial cases for years.

The supreme court squarely addressed the issue in *Chisom Against Roemer.* Couldn't be clearer. Quote, "We hold that state judicial elections are included within the ambit of Section 2 as amended," 501 U.S. 404. It doesn't get clearer.

And, Your Honor, defendants may cite cases like

Clements and *Fusilier*. What those cases discuss is there are ways that Section 2 can be different in the judicial context sometimes.

Specifically, there can be cases where there is something called a "linkage interest," interest in linking judges with a particular jurisdiction in which they exercise authority, like a parish judge in Louisiana being elected by their parish. It's explained at 963 F.3d 459, this concept. In those situations, parish judges in parishes, courts give some weight when a plaintiff comes in and says, "Let's restructure the judiciary."

But this case has nothing to do with that. Mississippi Supreme Court Justices don't have any district-specific function or jurisdiction. Justice Diaz, Justice Lamar, and others told us they serve the whole state. The whole concept of a linkage interest in the cases, as they have discussed it and recognized it, just doesn't apply here. And even if it did, it would just be another factor to consider on the totality of the circumstances.

And let's be clear at the outset about this. Plaintiffs are not seeking to impose single-member districts, a new structure for the judiciary of Mississippi. We are talking about three districts with three justices, each made up of whole counties, same basic system. Plaintiffs merely seek to alter the lines so that Black voters get a fair shot.

So let's talk about what the law is and then get into the evidence. *Gingles* has been applied by courts for decades. The supreme court reaffirmed it in *Milligan*, not a plurality of the court, a majority of the Court. And then the Fifth Circuit applied it and reaffirmed it in *Robinson* on the same type of evidence that was presented in this case, including some of the same experts.

And then following *Robinson*, in *Nairne* in the Middle District of Louisiana and *the NAACP* case in the Southern District, sister district courts applied the same standard, came to liability findings after trial based on the same type of evidence that has been presented here. And, again, many of the same experts, like Mr. Cooper, Dr. Burch, Dr. King.

And we aren't here to reinvent the wheel. We aren't here to get creative with the statute. We are here to apply the law to the facts presented in this trial.

So the first thing we do is we apply the *Gingles* preconditions. We determine whether the basic dilution dynamic exists. And then if the preconditions are met, we broaden the inquiry, and we ask about the totality of the circumstances using those senate factors as a guide.

So I want to talk at a high level about the function played by those three *Gingles* preconditions. Why are they so important?

Gingles 1 asks whether, looking at the illustrative

lines, a reasonably configured -- again, the illustrative lines, a reasonably configured Black majority district can be drawn consistent with traditional districting principles. It tells us whether there is a large, concentrated population of Black voters in a particular area of the state.

And then *Gingles* 2 and 3 ask whether patterns of racially-polarized voting exist such that Black voters, despite voting cohesively for preferred candidates, will typically usually be defeated under the current lines in light of persistent bloc voting. And these tell us, among other things, whether the current lines -- on 2 and 3, we start to think about the current lines -- are minimizing the voting strength of that large Black population.

And the Fifth Circuit has said, for example, in the *Teague* case, that it will be the "very unusual case," only the very unusual case, where those conditions will be shown -- a large Black population and high levels of racially-polarized voting -- where those conditions are shown and an ultimate determination of vote dilution does not follow.

Why is that? The reason is that the *Gingles* preconditions illustrate that fragmentation dynamic, a fragmentation of large Black populations by existing electoral lines, where Black voters fragmented are usually defeated at the polls in the context of racially-polarized voting. And the evidence shows that's exactly what's happening here. Black

voters in Mississippi are being fragmented by these supreme court lines.

And while there are ways that this case is unique, certainly, including because these districts are about 40 years old, this isn't the very unusual case when it comes to applying the Section 2 test. Rather, the evidence is fundamentally like the evidence in *Milligan,* in *Robinson*, in *Nairne,* and in *Mississippi NAACP*.

So, Your Honor, I'm going to talk about the evidence, march us through the *Gingles* test, the different factors, the evidence we've heard. But as we dig into the trial record, I want to answer one more big question. It's one that Mr. Shannon posed in opening. What has changed? What's changed? What's changed since Chief Judge Barbour decided the *Magnolia Bar* case over 30 years ago? It's a fair question. And after two weeks of evidence and testimony, the answer is everything. Everything.

Change Number 1. A reasonable Black-majority district can now be drawn. In *Magnolia Bar*, one key reason the plaintiffs lost -- I'd say the primary reason -- was that they couldn't draw a three-member district, Black majority, almost certainly not without using whole counties. So they lost on *Gingles* 1. And Mr. Cooper went back and looked, and he still couldn't do it with whole counties with those 1990 census numbers that applied. That was his testimony last week.

And now flash forward. The Black population has grown massively. Voting-age population is up over 130,000 in just two decades, more if you keep going back to 1987. Drawing one of the districts as a BVAP majority district using whole counties only is now easy. Plaintiffs have presented multiple configurations. So the evidence of illustrative plans being offered today are reasonably configured is overwhelming and it's largely uncontested.

Change Number 2. Racial polarization and White bloc voting have gotten worse. When *Magnolia Bar* was decided, Fred Banks, Justice Banks had just won a contested supreme court election with 30 percent of the White vote. That's what this Court heard over the last two weeks. And so Judge Barbour looked at the evidence, and no countervailing evidence, and concluded that "Whites will not necessarily" -- quote, "Whites will not necessarily vote as a bloc for White candidates having Black opponents in Mississippi Supreme Court elections."

And now flash forward. Today, no Black candidate gets 30 percent of the White vote. None. We looked at almost two dozen elections. None. That's the evidence in this case. No Black candidate got 20 percent of the White vote in any of those elections.

In District 1 races, it's undisputed that most Black candidates get less than 10 percent of the White vote. Judge Westbrooks, a sitting Court of Appeals judge, got 6 or 7

percent crossover vote. That's a sea change from where things were in 1992 and on another one of the critical core issues in the *Gingles* analysis.

Change Number 3. The evidence is far more extensive. The evidence presented in those prior cases was, in some instances, minimal. *Fordice*, the other case they cite, especially, a two-day trial. Plaintiffs called three witnesses in total. And that's just not much grist, not much grist at all for the intensely local appraisal that happens in a Section 2 case.

And now flash forward. Plaintiffs presented extensive expert testimony, not just on the *Gingles* preconditions but on all of the Senate Factors, on the totality of the circumstances, on the political process in Mississippi, its history, its dynamics, its inputs, its outputs. And that was combined with testimony, completely missing in the *Fordice* case, from numerous fact witnesses who spoke to racial polarization, the political conditions in the Delta, the history of these lines, their present day effects. This Court heard from a sitting judge and a senate minority leader and no less than three former justices in the Mississippi Supreme Court.

Change Number 4, the passage of decades. In the 1990s, these district lines were hot off the presses. Justice Diaz, who was in the legislature not long after, testified that

the expectation was that they would be redrawn periodically, as other electoral lines are.

And now flash forward. Four decennial census cycles have come and gone since these lines were last changed. There has been no change. The lines are now malapportioned in terms of population. And in the meantime, the evidence shows that political and racial polarization have spiked. Segregation and disinvestment have gotten worse for schools, especially in predominantly Black communities. Racial appeals have stubbornly persisted in politics. Black candidates have run for statewide office and supreme court, and they've lost repeatedly.

Looking around, Your Honor, everything has changed. And so in light of that, the thing to do is what the law requires, make that intensely local appraisal on the facts as they exist today, as established over the last two weeks in this courtroom.

Your Honor, here is what the evidence shows. Starting with *Gingles* 1, the standard is straightforward. It's flexible. Can a reasonably configured Black majority district be drawn consistent with traditional districting principles? That's the standard as considered and reaffirmed by a majority of the Court in *Milligan*.

And the discussion of *Gingles* 1 in the Mississippi *NAACP* case by that panel is illuminating. I did hear at one

point some reference to Justice Kavanaugh's concurrence. We may hear about that when defendants close. The three-judge panel discussed *Milligan* in detail, considered at length, and firmly rejected the idea that Justice Kavanaugh's concurrence involved any, quote, "alteration of what he accepted as the majority's understanding of precondition one." In the Westlaw Report, that's pages 13 to 14 in that three-judge panel case.

So the *Gingles* 1 standard is very clear. It involves looking at illustrative plans and asking if they are reasonably configured looking at traditional districting principles. We take into account the traditional principles like compact shape, equal population, contiguity, communities of interest, respect for existing political subdivisions like counties. And the evidence that these illustrative plans are reasonably configured is comprehensive and it's almost entirely uncontested.

Start with Bill Cooper. Mr. Cooper did a detailed demographic analysis demonstrating that there are areas in the state where the Black population is numerous and concentrated. The demographic reality is that Mississippi's Black population has grown substantially and Mississippi's White population, slightly down level.

Mr. Cooper analyzed population at the state level, the county level, regional level, congressional district level, and identified particular regions of the state where this growth

makes it almost certain, just on a demographic basis, that a whole-county majority Black supreme court district can be drawn. The population is changing, and it's been changing. But the political reality of these district lines has not changed.

Mr. Cooper's analysis also showed that the lines that have now been in place for so long exceed that plus or minus 5 percent population deviation that is typically used when you implement the one person, one vote principle.

Now, the general area that Mr. Cooper identified where a Black majority district can be drawn is actually the same area Dr. Swanson identified using his cluster analysis. It's the area that numerous experts and fact witnesses identified as including the Mississippi Delta. Mr. Cooper testified that the Mississippi Delta is cracked under the current lines, as, in sum and substance, did all of those fact witnesses who looked at these lines, as did Dr. King.

Mr. Cooper demonstrated in his report and on the stand that his illustrative plans each include a reasonably configured BVAP majority Supreme Court District 1. And that's the entirety of what *Gingles 1* requires.

How do we know that these illustrative districts are reasonably configured? Well, for one, on the objective metrics and traditional principles, Cooper's illustrative plans are comparable, comparable or often better than the existing lines.

The evidence is uncontested that, on population equality, Mr. Cooper's plans reduce that population imbalance. The evidence is uncontested that Cooper's plans split zero counties, zero precincts, zero municipalities. County lines are expressly referenced -- referenced -- excuse me -- in the Mississippi Code on redistricting. "Following them" -- and this is -- Justice Kavanaugh points this out in Footnote 2 of his concurrence in *Milligan.* "Following them is a key indication that a plan is reasonable."

The evidence is uncontested that the districts in Cooper's plans are reasonable in their shape. Dr. Swanson agreed. There are no extreme shapes here. He agreed they perform comparably or better than the existing plan on most of the mathematical metrics. He didn't offer any negative opinion on these district shapes. And Mr. Cooper, who has done this time and time again, told you he has no doubt that these whole-county plans are sufficiently compact.

The evidence is also uncontested that Cooper's plans respect and unite communities of interest. Mr. Cooper spoke to this, how his plans unite the Delta, split a few of those planning and development district regions, include Highway 61, how they made more sense from a riparian perspective with the Mississippi, then the Gulf, and the Tenn-Tom each anchoring one of those three districts.

The testimony from the fact witnesses is absolutely

overwhelming on the communities of interest front. Witnesses from across the Delta -- from Ty Pinkins in Sharkey County, to Judge Thomas in Bolivar County, Derrick Simmons who represents territory going up to Coahoma County -- talked about the Delta, about the common challenges, interests, and identity that it represents.

Dr. King called it one of the most distinctive communities in the Nation, similar to and maybe even more so than the Black Belt in Alabama, which was discussed in the *Milligan* case as a community of interest. The Delta is a community of interest that can be taken into account when configuring a reasonable plan.

And the kicker of it is, Dr. Swanson's cluster analysis, which his own published work says can be used to evaluate communities of interest, supports the plaintiffs. He agreed that Cooper's illustrative plans joined together counties with similar needs and interests beyond race. And that is literally the definition of communities of interest as discussed by the Fifth Circuit in *Robinson*, 86 F.4th 590.

And if all of that wasn't enough evidence of a balanced and reasonable plan, the Black majority district in Cooper's Illustrative Plan 1 also follows those congressional district lines enacted by the Mississippi State Legislature just two years ago.

Your Honor, Mr. Cooper has drawn numerous electoral

maps in Mississippi and across the country. He has drawn judicial districts. He's testified in over 50 federal cases. He was forthright, knowledgeable, specific, unequivocal on the stand. He told the Court that these districts aren't hard to draw, that he didn't move any particular county in or out because of race.

And defendants might have a few responses to all of this, but none of them are borne out by the evidence, and perhaps even more importantly, none of them have to do with *Gingles* 1. One thing they will say at some point is that the existing district is majority Black CVAP using those ACS estimates. Mr. Wallace started to get into this in the Rule 52 argument.

And that's true if you just look at the CVAP estimate, but it's neither here nor there for *Gingles* 1. On *Gingles* 1, the question is just whether a reasonably configured BVAP majority district can be drawn, whether the illustrative plan is reasonably configured. Because the *Gingles* 1 focus is on the illustrative plans, it doesn't matter if the existing district is majority CVAP, even majority BVAP. It doesn't matter for *Gingles 1* purposes.

As Mr. Cooper noted from his experience -- he was the expert in that *Thomas* case -- you can have a Section 2 lawsuit even when the challenged district is already BVAP majority, just like the case in that Delta state senate district in 2019

where the BVAP of the successfully challenged district was over 50 percent. And Judge Reeves's decision is reported at 366 F. Supp. 3d 805.

And that makes sense because the question is whether the result of the lines is vote dilution. So we have to look at, is there a district that could be drawn, and do the current lines fragment and dilute the vote of that community? That's the question.

So it is true the existing district has a relatively high BVAP compared to 30 percent, but on *Gingles* 1, it doesn't matter. The BVAP or the BCVAP of the existing district might matter if the higher Black population meant that Black voters were usually able to overcome White bloc voting and win elections. But as we'll talk about on *Gingles* 3, the evidence doesn't bear that out.

And the other problem with defendants' argument -- and we might as well address it now when we are talking about *Gingles* 1 -- is if you are going to use CVAP, if you are going to use that estimate rather than using the census numbers, you should think about the population that is actually eligible to vote, and you should factor in felon disenfranchisement, which the uncontested evidence indicates affects many tens of thousands of Black Mississippians who are permanently disqualified from voting.

And when it comes to measuring the population that is

actually eligible, yeah, Mr. Cooper didn't take out a calculator and do it, but he testified felon disenfranchisement makes all of the difference in the world. He said, "That's why I really didn't focus on CVAP in this case, because I knew that, based on well-documented information about the size of the felon population in Mississippi and the disproportionate impact it has on Black felons, clearly, the current plan would not be majority Black, and it would not be majority Black CVAP" after taking that into account.

And, sure enough, when you do the math and when Black voting eligibility is adjusted to include those tens of thousands, it drops under 50 percent. That's what we did with Dr. Swanson on the stand. I don't understand, honestly, why the arithmetic started to change and why we started needing to subtract from the denominator once we were factoring in folks who were out of prison when we didn't do it when people who are in prison were being included.

But I think it's pretty clear that Dr. Swanson didn't dispute the numbers. He didn't dispute how he did his own calculation. And when you do his calculation on the numbers, then the adjusted Black CVAP goes well under 50 percent.

Here's another argument that defendants may make. They may talk about core retention. In the end, none of the experts testified it was a districting principle. Dr. Swanson agreed that Cooper's plans keep the vast majority of

Mississippians in their current supreme court districts. And by the way, in case the Court wanted to consider it, Mr. Cooper also presented least-change plans that show you can make a true Black majority district by shifting as few as seven counties.

Maybe defendants will talk about Dr. Swanson's diversity theory -- as a reminder, this was the idea completely foreign to the law and practice of redistricting, as I understand it -- that you should intentionally spread groups across districts in a plan to make them more -- I think he used the term "diverse." That's not a districting principle. It's more like a dilution principle. You won't find any case embracing it. And as Dr. Swanson conceded, it's basically the opposite of considering communities of interest. It's exactly what the traditional principles tell us not to do.

And that, I think, brings us to the last point they may make on *Gingles* 1. I suspect you will hear some version of the argument that the very concept of communities of interest shouldn't apply here. And that's going to get them nowhere for two reasons.

First of all, it just doesn't matter because you can take communities of interest out of the equation entirely, and on the facts that have been presented, the illustrative plans are still reasonably configured with equal populations, compact district shapes, no county splits at all. That's the ball game on *Gingles* 1.

But, second of all, it's wrong as a legal matter. Here's Judge Southwick in *Robinson*. On *Gingles* 1, "Traditional districting principles like maintaining communities of interest and traditional" --

THE COURT: Slow down.

MR. SAVITZKY: -- "boundaries should be considered," page 590.

And forget the majority in *Milligan*. Here's Justice Alito dissenting in *Milligan*. Quote, "The first *Gingles* precondition takes into account traditional districting criteria like attempting to avoid the splitting of political subdivisions and 'communities of interest.'" And that's page 96, 599 U.S. And, of course, in the *Mississippi NAACP* case, the Court there considered communities of interest as well.

So I take their argument to be that there is some exception for these districts where communities of interest stop being one of the key traditional districting principles that we always consider. And there isn't any evidence in the record to show that that is the case. There aren't any cases that support that. And the fact that these lines are and have been used not only for supreme court but for public service commission and transportation commission only underscores that we should use the traditional principles that apply in every other case.

Your Honor, the cases say that *Gingles* 1 is not a

beauty contest. If it was a beauty contest, I would like our odds. On the strength of Mr. Cooper's unequivocal and comprehensive testimony, Dr. Swanson's concessions, and the overwhelming testimony of Mississippians from across the Delta, the illustrative plans are reasonably configured and *Gingles* 1 is met.

So let's talk about the second and third *Gingles* preconditions and proving those. Before we get to the evidence, I want to make something clear about the order of proof. There have been some arguments about the relationship between party and race. They suggest that the polarization between Black and White voters that we see in the data and the evidence is due to a mere coincidence of party affiliation, even though this case involves nonpartisan elections.

And this argument came up in the three-judge panel case as well, and the Court dealt with that there in, I think, precisely the right way, by thinking about this issue on the totality of the circumstances. And so I will address it there.

On *Gingles* 2 and 3, as the cases apply them, the question is simply about what voters are doing. *Gingles* 2, are Black voters voting cohesively for preferred candidates? *Gingles* 3, are White voters voting against those candidates such that they usually lose outside of Black majority districts?

In other words, it's about the preferences of voters.

It's about whether voters are divided by race. And in the cases, what you typically see is 85, 90 percent cohesive voting by Black voters for one candidate -- and by "the cases," I mean the cases where plaintiffs prevail on the merits -- and you see White cohesion around 85 percent or more.

In *Milligan*, it was about 90 percent Black cohesion. White crossover voting was around 15 percent. That's discussed at page 22 in *Milligan*. In *Robinson,* you had about 90 percent Black cohesion. You had White crossover voting between 11 and 20 percent. That's 86 F.4th at 597.

What are these factors doing? *Gingles* 2 is looking at Black voters. We look at Black cohesion to determine, if plaintiffs win, if we draw a Black-majority district, will Black voters actually vote cohesively and elect candidates. *Milligan* talks about that at pages 18 and 19.

And then *Gingles* 3 looks at the interaction between Black and White bloc voting under the current lines. It establishes that the challenged districting, the existing lines, thwart a distinctive minority vote at least plausibly on account of race.

And so what does the trial record show? The Court heard from Dr. Orey on *Gingles* 2 and 3, an accomplished political scientist with extensive experience conducting the standard analysis used by courts to assess racially-polarized voting, ecological inference. He analyzed nearly two dozen

elections. He looked at every biracial election in District 1 for the last decade or so. His analysis is largely, if not totally, uncontested by Dr. Bonneau. It's corroborated by Dr. King and by fact witness testimony.

And the word that came up again and again when Dr. Orey was on the stand was "extreme." The degree of racially-polarized voting that Dr. Orey found is extreme in election after election after election, especially in the biracial contests that courts and scholars tell us are the place to focus.

On *Gingles* 2, every single contest we looked at, the level of polarization was, quote, "extremely high." Black cohesiveness was almost always over 90 percent. White cohesive voting against the Black candidate was almost always 90 percent or higher. Dr. Orey said the numbers are so high you just don't have much room left.

And Dr. Bonneau didn't disagree with any of that. And witness after witness confirmed it based on decades of experience in Mississippi politics. Percy Watson, Derrick Simmons, and others told the Court candidates and campaigns understand that Black candidates will be able to win votes and support from Black voters, but in predominantly White areas, it's almost certain that you are not going to get that support.

Frankly, I don't take defendants to be disputing the existence of extreme, pervasive, consistent patterns of

racially-polarized voting. And you couldn't dispute it on this record. So that's *Gingles* 2.

On *Gingles 3,* the question is whether racially-polarized voting patterns, and in particular White bloc voting, mean that Black voters' preferred candidates will usually be defeated on the current lines. Do White voters vote sufficiently as a bloc usually to defeat the candidates supported by Black voters? And the answer is yes.

Right here on the screen are the key elections to consider. The nine biracial endogenous and quasi-endogenous contests in that district, where you have a Black candidate and a White candidate, that are most probative of whether high levels of White bloc voting will usually result in the defeat of Black-supported candidates.

Dr. Orey testified these are the key contests, especially -- especially those two supreme court elections. And Dr. Bonneau agreed. And, remember, Dr. Bonneau actually testified he wasn't offering an opinion on *Gingles* 3 in the first place.

So in these two supreme court elections, which are the most important contests, Black challengers lost both times, garnering well under 10 percent White crossover voting. 5 percent, 6 percent.

And looking at the nine contests as a whole, including those commissioner races, including different election years,

Black candidates lost two-thirds of the time. Six out of nine, they were defeated. And by any fair definition of "usually," and certainly by the more-often-than-not definition that Dr. Orey and Dr. Bonneau both agreed on, Black candidates are usually defeated in these District 1 contests with extremely high degrees of White bloc voting.

Now, in terms of writing an opinion in this case, you could stop there and move to the totality of the circumstances. But, again, I want to anticipate what defendants are going to argue.

And no doubt they are going to point out that sometimes in some of these contests Black candidates won. And that's true, but it doesn't get them anywhere. For one, again, it's those supreme court contests, those two endogenous elections. They are the most important. That's what the experts agreed on. And in those races, the Black candidates lost both times, 0 for two.

For another, the cases tell us that the election of a few minority candidates doesn't foreclose the possibility of a vote-dilution problem. *Clark*, for example, says that, 80 F.3d 1397.

No doubt you can factor it into the ultimate question of whether there is an equal opportunity to participate and elect candidates of choice, but in terms of *Gingles* 3, the question is narrower. Is White bloc voting sufficiently high

that these Black candidates are usually being defeated? And two-thirds of the time, looking at these key contests, is usually, by any reasonable definition.

And, third, we need to be mindful of outliers, as Dr. King and Dr. Orey told us. Two of the three races where Black candidates won involved a single candidate, Willie Simmons, and he was an incumbent in 2023. Two of the three involved a single election in 2023 that Dr. Orey identified as a potential outlier, with a Democratic candidate for governor at the top of the ticket, had unprecedented focus on Black turnout.

And Dyamone White and Derrick Simmons talked about that as well. Percy Watson contrasted the 2023 election with judicial elections where, for reasons also discussed by Justice Diaz, it's harder, especially for Black judicial candidates, to break through.

And Dr. Bonneau's testimony is actually especially important here. He studied judicial elections, including nonpartisan judicial elections, closely. That's his field. And what he testified, based on his own scholarship, is that you see more ballot roll-off, more folks not voting for some offices as they go down the ballot, in these nonpartisan judicial contests.

He testified that roll-off is especially high among voters with lower levels of education, lower levels of home

ownership. That's his scholarship. And in Mississippi, according to the undisputed evidence, that means voters who are more likely to be Black.

And all of that makes it harder for Black supreme court candidates in Mississippi to overcome White bloc voting. All of that is consistent with the evidence that Black candidates might sometimes in this district break through in the partisan commission races, but they aren't doing it in the supreme court contests that are at issue here.

And Dr. King spoke to this as well. He testified that voters think about different things when electing candidates to different offices. Willingness to elect a Black transportation commissioner may not mean willingness to elect a Black supreme court justice.

The defendants may also say, "Well, what about Leslie King? What about Justice King?" It's true he won his elections. He won them with 100 percent of the vote because they were uncontested.

And the cases specifically say we don't consider uncontested elections when we think about this question. And the reason for this is that uncontested elections don't, and they literally can't, tell us anything about whether Black candidates are or are not defeated by White bloc voting against them. You can't vote against an unopposed candidate.

And that's especially true here given all of the

testimony from Justices Diaz and Anderson and Lamar about the power of the government's -- the governor's -- excuse me -- appointment, which we heard is like a super endorsement and a signal. Percy Watson said it can -- especially from a White Republican governor for a Black candidate, it can clear the field of credible opposition.

Especially given the power of that appointment, it's very telling that, when there was a proposal in 2016 to change these lines and lower the BVAP by just half a point, Black members of the house of representatives strenuously opposed it because they felt that even that minor change would endanger an incumbent like Justice King.

And by the way, we are going to talk about candidates who could have run but didn't. The actual evidence in the record here on that subject supports plaintiffs' theory of the case.

Senators Simmons and Constance Slaughter-Harvey testified about the interest in running for supreme court among Black attorneys in Mississippi. But as Senator Simmons told us, the interest is not matched by opportunities.

And as Dr. King testified, district lines, district composition matter. When candidates don't see a real opportunity, they don't run. They decide not to run. And the evidence indicates that potential Black supreme court candidates could look at these districts, look at these

results, and decide they can't win.

And what else? Defendants may also say, "Well, look at Justice Kitchens. He won." That's true. First of all, you can add Justice Kitchens and Cecil Brown into this mix. Black supported candidates still are going to be defeated more often than not. Still usually the case. And if you look at supreme court elections, it will be one out of three. If Justice Kitchens -- those two Black candidates still lose.

And, second of all, the unrebutted testimony from the experts, consistent with the cases, is that we focus on biracial contests. As Dr. Orey explained, Black voters tend to prefer Black candidates when given credible, viable options. As Dr. King testified, Black voters are keenly aware of candidate viability. They vote on that basis.

And so looking at contests without credible Black candidates -- defendants didn't put on evidence that candidates like Ceola James or Bruce Burton, who we mentioned, were considered viable by Black voters -- doesn't speak clearly to whether Black-preferred candidates can win despite White bloc voting. And that's the question.

Defendants may also point to those exogenous elections, like Barack Obama and Mike Espy. All of the experts, including Dr. Bonneau, testified that those are far less probative. And Dr. King's analysis about different attitudes or different offices applies even more strongly

there.

They may tell you Judge Westbrooks didn't lose because of race. And, first of all -- and let's be clear about this -- it's not "because of." It's not "because of." The question is just whether White bloc voting was sufficiently high for Black-preferred candidates to be defeated. There is no dispute that it was.

Judge Westbrooks was a sitting appellate judge. All of the evidence was that she campaigned hard, raised money. Constance Slaughter-Harvey talked about that. Turned out Black voters in the Delta, as Derrick Simmons discussed. She went on bus tours. She campaigned for White votes. She went to the Rotary Club.

And I suppose one other thing defendants may say is something we talked about already. They may say, "Well, District 1 is already BVAP plurality and CVAP majority." We talked about that.

"Maybe," they'll say, "if people in District 1 -- if Black voters in District 1 just registered at even higher rates and then voted for Black candidates at even higher levels of cohesion than this, maybe then they could win a supreme court seat." That's not how this works. Black voters do not need to vote with 100 percent cohesiveness for preferred candidates for the protections of Section 2 to kick in.

On *Gingles* 3, we look at the elections as they are.

We ask what result occurs in light of racial polarization. And the numbers show that White voters in District 1 are voting massively as a bloc against Black candidates in these elections, and usually the Black candidates are defeated, especially in supreme court races. That's *Gingles* 3.

So let's talk about the totality of the circumstances. And, again, it will be the very unusual case in which the plaintiffs can establish these preconditions and still have failed to show a violation under the totality of the circumstances. Again, that's *Teague*, 92 F.3d 293. And that's because, again, once you have demonstrated the three preconditions, you have demonstrated that racially-polarized voting patterns are operating to minimize Black voting strength, even though lines could be reasonably drawn to give Black voters a full and fair opportunity.

And so at the totality of the circumstances phase, we look at the big picture. We look at past and present reality, as the cases tell us. We ask whether the political process is equally open as to these district lines.

And, now, having mentioned equality, I hear another argument from defendants in my ear. Something like, "It's hard to imagine finding a more equal district than District 1," something like that in the pretrial brief. And, Your Honor, this misstates the question. That argument misstates the question.

Once we're on totality of the circumstances, once we have established we can draw a reasonable illustrative district, once we establish what happens in the districts as drawn, then we zoom out. On the totality of the circumstances, the question, as Judge Southward quoted in *Robinson*, is whether Black voters, quote, "have an equal opportunity in the voting process to elect their preferred candidate under the challenged districting map." Under the challenged districting map.

And Dr. Bonneau and Dr. King looked at supreme court elections across the state, across the entire challenged map. Dr. Bonneau said that, counting Leslie King's two unopposed wins, counting those, Black-preferred candidates had won five supreme court elections out of 26, total, since 2000, all five in District 1. None from the other two districts.

In other words, what Drs. Bonneau and King saw was that the other two districts that have large White majorities have only ever been represented by White justices. And as long as the unfortunate reality of pervasive racially-polarized voting that was demonstrated in this record remains, that will likely continue to be the case.

And then we have District 1, which has a larger Black population, large enough to come closer, maybe even large enough to sometimes win in those partisan commissioner races in a good year for Black turnout but not actually, at least on this evidence, to win a contested supreme court contest.

So defendants' argument is treating those two White majority districts, one of which takes in many of the counties in the North Delta, like they don't exist. They want to focus all of the attention on District 1, argue about whether it's equal, and bank those other two districts where Black voters will never have an opportunity, as long as racially-polarized voting exists at this level, to win elections. It's not the law. It's not fair. It's not right. It's not the law.

And so at the totality of the circumstances stage, we think about the challenged map. We look to the senate factors to guide our analysis of these lines. And in particular, I would submit that the Mississippi *NAACP* case is instructive on the senate factors piece.

Now we're looking at much the same history, much the same political process. Much of the evidence is similar. The analysis is similar. Obviously, it's a different record. And we would submit that, on an intensely local appraisal of these districts, based on this trial record, the end result should be the same.

So what I want to do is walk through these senate factors. We don't have to win them all. It's not a requirement that you get certain ones or all of them. They are considerations to help guide the inquiry. And I'll talk about each of them and how they contribute to the overall picture of district lines that deny Black Mississippians a full and fair

opportunity to elect candidates of choice to the Mississippi Supreme Court.

Starting with Senate Factors 1 and 3, "The most relevant historical evidence is relatively recent history, but even long-ago acts" -- and this is the three-judge panel citing *Veasey Against Abbott* -- "even long-ago acts of official discrimination give context to the *Gingles* analysis."

Dr. Campbell and Dr. King detailed the long history of discrimination against Black voters in the political process. No one disputes it. They testified that racial exclusion was a key driver of political development in Mississippi from the 1890 Constitution, to White primaries, to gerrymandering, and vote dilution. Sometimes these barriers have been race-conscious. More often, they have been -- and some cases still are -- facially race-neutral.

Your Honor, there's no better place than Oxford to quote the man who said, "The past is never dead. It's not even past." And make no mistake, the history of discrimination continues to impact Black Mississippians to this day. The testimony this Court heard in trial shows that history exerts an influence personally for individuals and for voters.

Constance Slaughter-Harvey testified about watching her father be denied a ballot, about working as a poll watcher with Fannie Lou Hamer, being inspired by Mississippians in the Delta who put their lives at risk. Percy Watson talked about

attending a segregated school. Justice Anderson talked about Oxford being segregated when he got here for law school, about paying a poll tax himself, about trying desegregation cases around the state and being unable to find plaintiffs in areas where the Klan was too strong.

These aren't stories from a book. They're the lived experiences of flesh and blood witnesses who testified in this courtroom. Things are different now, and that is very much a good thing. But the past is not past. It remains with us.

And the testimony also shows that barriers remain, barriers that resonate from the past. Dyamone White, a young leader eager to get into politics, testified about offensive comments made to her while making political phone calls, while visiting Neshoba to campaign.

On Senate Factor 3, voting practices that tend to enhance discrimination, the record shows that those have continued deep into the modern era.

You heard Dr. Campbell describe some of the nearly 200 interventions that are listed in the record. That included an effort to redraw the state's congressional lines in 1967 to stretch east to west in order to dilute Black voting strength. And it's shown here (indicating), Plaintiffs' 28. It includes the widespread adoption of at-large districts. Again, the district here (indicating). It includes an attempt in the 1990s to resurrect the dual registration rule from the 1890

Constitution in order to confound the implementation of the National Voter Registration Act. And those are in addition to the numerous successful voting rights cases, Section 2 cases, districting cases like the three-judge panel case or the *Thomas* case in recent years.

Now, you heard that Mississippi Supreme Court elections use a majority vote requirement, which the cases say can have discriminatory effects. You heard that Mississippi has very frequent elections, which Dr. King testified can cause voter fatigue. You heard extensive testimony on Mississippi's felony disenfranchisement, which affects tens of thousands. You heard about the adoption of voter ID laws shortly after *Shelby County*, another potential barrier.

You heard about restrictions on absentee voting, notarization requirements. You heard about the adoption of voter purge rules beyond what federal law requires. You heard from Mr. Kirkpatrick about how many of these rules are enforced at the local level without significant oversight. You heard about how Mississippi does not offer early voting, mail voting, or online registration or same day registration or other practices that may make it easier to vote.

As Dr. Campbell and Dr. King explained, Mississippi has some of the most burdensome voting rules in the nation. The cost of voting is extremely high. And that's why the testimony that you heard about rides to the polls and things

like that matter.

Mississippi does not make it easy to vote. It makes it hard, very hard. The fact that Congressman Thompson tries to help voters get to the polls doesn't and can't make up for that. As Dyamone White testified, not everyone can get a ride.

Defendants may come and tell you that none of this amounts to a denial of the right to vote. And they'll point to the voters you heard from at trial, and they say -- they'll say, "Well, these folks didn't have any problem voting. They testified they vote all of the time."

Think about the character and the fortitude of the people who you heard from who testified. Ms. White said she would go back to Neshoba. Even if it meant bringing security, she would go back. Aelicia Thomas pushed for 20 years to get to the bench. Setback after setback. Ty Pinkins talked about chopping cotton as a teenager, multiple tours in Iraq. These are strong people. And that's to say nothing of people like Constance Slaughter-Harvey and Justice Anderson.

You heard from people at this trial who have overcome all kinds of obstacles. But that doesn't mean for a second that the high cost of voting in Mississippi don't press more heavily on the shoulders of Black Mississippians. And so Senate Factors 1 and 3 do weigh in favor of the plaintiffs.

Let's talk about Senate Factor 2, the extent of racial polarization, often considered the most important.

Regarding the level of polarization in Mississippi in politics, the evidence is extremely strong in plaintiffs' favor. Again, the levels of polarization are extreme, completely pervasive in all the elections we looked at. Witness after witness talked about racial division in politics, about how Black candidates can't win outside of Black majority districts.

Justice Anderson testified that, in Mississippi politics, race is number one. And defendants are going to say, "Well, the voter behavior we see in Mississippi is party polarization. It's being driven by party and not by race." Evidence doesn't support that claim.

Now, the way the Court should think about this and resolve this sort of party versus race defense is well described in the three-judge panel case starting in the Westlaw Reporter at page 39. So I want to just talk about who has the burden on this, what's the law, what are the facts.

On the burden, proof of racially-polarized voting, which we have here to a massive degree, we talked about in *Gingles* 2 and 3, creates an inference of racial bias in the electoral system. And that's what *Teague* tells us. Judge Wisdom in *Marengo County*, an 11th Circuit decision, wrote that Racially-Polarized voting is itself, quote, "the surest indication of race-conscious policy."

And so once a plaintiff shows racially-polarized

voting patterns, "They don't have the burden" -- and now I'm quoting the three-judge panel -- "the burden of negating all nonracial reasons possibly explaining" those polarized voting patterns.

COURTROOM DEPUTY: Five minutes.

MR. SAVITZKY: We don't have to prove a negative. As the Court said, we have no duty to disprove the factors other than race affected voting patterns. What *Teague* says, it is up to the defendants to try to rebut plaintiffs' claim of vote dilution via evidence of objective, nonracial factors.

And what do they have to do? The *NAACP* case discusses this in detail, talks about the *Clements* case. That's a judicial case out of Texas. That was a case where the inference was rebutted.

And what did you have there? Large amounts of White crossover voting, 30 to 40 percent; both parties aggressively recruiting and nominating and electing minority candidates; White voters consistently voting for and electing minority candidates to office based on their party preferences.

And the three-judge panel looked at the circumstances in Mississippi and said this case is different. Circumstances in Mississippi are different. They are not that. And the record in this case is similar, and it's even more stark. On the level of White crossover voting, it's miniscule. It's not 30 or 40 percent. Totally different from *Clements*.

There is no evidence of both parties recruiting and nominating Black candidates for the supreme court. Justice Diaz hadn't heard of such a thing. Dr. Bonneau hadn't seen it in his research. Percy Watson hadn't seen it. And on top of that, something that was relevant in the three-judge panel case, witnesses testified, Dyamone White and Ty Pinkins, that White candidates don't campaign in their areas and haven't responded to their outreach.

And we can actually go deeper. The quality of the data allows it. We have primary elections. Dr. Orey looked at a competitive head-to-head primary, and he testified -- and Dr. Bonneau didn't dispute -- party can't explain why you still see polarization.

And perhaps most telling, we can see the way that voters react differently to the race of candidates. Look at the election on the screen. Justice Kitchens got 40 percent of the White crossover vote against then-Judge Griffis, a number that is more than double what any Black candidate has obtained in the last decade plus. Four years later, Judge Westbrooks ran in the same district against the same opponent. White crossover support was less than 7 percent.

What the three-judge panel says applies here even more strongly. Race matters. And that's consistent with the secondary literature discussed by Dr. King and others.

And if more were somehow needed, the historical and

political science evidence shows that, while party and race are correlated now, it's race that has driven that change over the course of history. "Race fits the data perfectly," testified Dr. Campbell. "Racial polarization is what caused partisan polarization," testified Dr. King. There's no other evidence in the record.

And none of this is predetermined. Voters vote based on their values and their interests. And when parties and candidates change their message and positions, voters can respond. Polarization could change.

But on the facts as they stand today on this trial record, and especially on the data from election after election after election, the extreme nature of racial polarization shown here is undeniable. Senate Factor 2, that most important factor, weighs decisively in favor of the plaintiffs.

I want to just briefly touch on Senate Factor 4. That's the exclusion of members of the minority group from candidate slating processes.

It can come up in judicial cases. It often doesn't come up, but in judicial cases -- and we cite the *Lopez* case in Texas -- where there is a significant appointments process, it can be relevant. Obviously, we don't have party slates here. The candidate who gets to run as an incumbent with that super endorsement is selected by the governor. And as we heard, six of the current nine justices were selected by the governor.

All four of the Black justices on the Court were selected by the governor.

And remember what Justice Diaz said. There are more White justices who were first appointed to the Court sitting on that body today than there have been Black justices in history in Mississippi. And there's evidence that White judges can win without that appointment, but there isn't evidence that Black justices can win without that appointment.

The point is only that the prominence of this appointments process, where decisions are made by, invariably thus far, a White governor, in the context where politics are highly divided by race, operates in practice to disadvantage Black candidates. And the fact evidence is consistent as well. For example, Constance Slaughter-Harvey testified about urging Governor Musgrove to appoint more Black judges, without success.

So we aren't hanging our case on this, but it's another data point. It matters. It's another way in which there is an unequal playing field for Black voters when it comes to supreme court elections in Mississippi.

On Senate Factor 5 -- and I realize I may be going a little slower than I anticipated.

THE COURT: So keep up with the time over, but you may continue.

MR. SAVITZKY: Excuse me, Your Honor?

THE COURT: I have asked Tracy to keep up with your time you go over because I'm going to extend it to the defendants too. But you may finish.

MR. SAVITZKY: I appreciate the opportunity, Your Honor.

On Senate Factor 5, the evidence, and especially the testimony of Dr. Burch, shows that racial disparities persist in Mississippi along every conceivable metric of socioeconomic well-being. Dr. Burch discussed the gaps in education, income, health, transportation, criminal justice. Her testimony was backed up by Mr. Cooper's comprehensive analysis of the ACS data, by Dr. King's testimony, completely undisputed by Dr. Swanson.

On education, for example, the educational attainment gap between Black and White Mississippians is large and consistent with extensive evidence of persistent de facto segregation in schools; underfunding of public schools, especially predominantly Black public schools; more discipline for Black students; lower performance. Dr. Burch talked about all of this.

And the evidence is that the situation is in some ways getting worse. Remember Derrick Simmons's testimony talking about how Greenville schools have closed since its population has become less racially mixed. And the evidence is that this inequality in education is deeply and intimately connected to

the legacy of discrimination. Legally segregated schools are not ancient history. We heard from witnesses who attended them.

And Dr. Burch's analysis showed that education is absolutely critical in terms of voting and participation. She testified, "It's one of the most fundamental findings in political science that people with higher educational attainment vote more than people with lower educational attainment." No one contests that.

And what her analysis showed is that this is true in Mississippi. Education is highly correlated with turnout. Black voters and White voters at each educational level vote at similar rates. Black college graduates and White college graduates vote at similar rates. Black folks with a high school degree, White folks with a high school degree vote at similar rates.

But education is not distributed equally between Blacks and Whites in Mississippi. White Mississippians are ten points more likely to have a college degree, eight points more likely to lack a high school diploma. And that inequality drives the turnout gap. It increases the burdens on voters.

And the testimony is that education, money, vehicle access, Internet make a difference for people whether they turn out and vote in an election. People require resources to vote. And on every measurement of those resources, Black

Mississippians are worse off.

And on criminal justice, the evidence was, again, uncontested. 60 percent of those who are incarcerated and disqualified from voting are Black. Mississippi is 30 percent Black.

Again, the totally uncontested testimony is that all of these are connected to discrimination, the history of discrimination, and they affect the costs of participation, making it more difficult for Black Mississippians to participate in comparison to Whites. That's the type of evidence the three-judge panel relied on in Senate Factor 5.

And, Your Honor, these aren't just statistics. These are people's lives. Dyamone White testified about the people in the Delta who couldn't get a mortgage because they don't make a living wage. Senator Simmons talked about the Black Mississippians who have had interactions with the criminal justice system who may believe they are disenfranchised even if they aren't.

Ty Pinkins talked about his brother going to the ER for lack of affordable health care, his mother driving three hours to get a checkup with kidney failure, about seeing family members dealing with diabetes just start to disappear and to rot away because they didn't have access to health care. "It's been detrimental on my family."

All of that affects participation. That is what the

uncontested evidence shows. And so, Your Honor, the evidence shows these disparities contribute to an actual gap in turnout in Mississippi between Black and White voters.

The Court was treated to a battle of the experts during the trial. Let me make one thing clear. You don't need to resolve that battle.

Here's what the three-judge panel said in thinking about the same type of ballot. "Irrespective of the size or even existence of turnout discrepancies, we find that the record establishes Black Mississippians' ability to participate effectively is hindered by racial gaps in education access, financial status, and health."

Senate Factor 5 thus weighs in favor of the plaintiffs. So you don't need to resolve this question of is there really a turnout gap or not. But, Your Honor -- and I know I'm going slower than anticipated. I could talk about quantitative methods for analyzing voter turnout until the cows come home and --

THE COURT: But don't.

MR. SAVITZKY: Don't do it.

But I do want to be clear that, if you look at this battle, if you want to resolve it, it's a technical knockout.

Just briefly looking at the chart, Dr. Burch's multiple independent methods to estimate voter turnout by race, including in District 1, they line up -- her total turnout

numbers line right up with the secretary of state's own numbers on how many people voted.

What are the methods she used? She used ecological inference. We have heard about that method. It's the best method we have in political science to estimate turnout and candidate support by race. The EI analysis yields a total turnout number that is right on the money. 58 percent.

Dr. Swanson testified he didn't know how to run EI. He hadn't investigated the King's EI method before this case. He -- his biggest complaint was he didn't understand it. It was a "black box" to him.

And by the way, remember his confusion about whether these numbers in the parentheses were confidence intervals? He talked about it on direct and then on cross. He said, "Are these confidence intervals? We don't know." Look at the title on the top of this page. Look at the last sentence. "Confidence intervals in parentheses." It just says it right there.

Then we have the CES, the other method Dr. Burch used. She testified it's widely used, a reliable voting survey. It's a totally separate methodology. It verifies voting behavior. So it's not an unverified self-report.

Dr. Bonneau, another political scientist, vouched for the CES's reliability. He used it to write his own award-winning book. And the CES, like the EI analysis, shows a

big turnout gap and a total level that is in line with the actual benchmark number.

And, again, Dr. Swanson didn't know about the CES until he got involved in this case. He hasn't used it. He came up with some convoluted statistical arguments about why he doesn't like how Dr. Burch analyzed the data. He doesn't dispute what the data shows. And it turned out he had a whole second set of criticisms that he put in his report on the CES, but those turned out to be based on his own mistaken understanding of how to use the weights in the CES.

And, Your Honor, I don't like talking badly about people; so this part is a little hard for me. But Dr. Swanson wasn't credible. He couldn't explain his conclusions. His CVAP calculation method, which seemed so simple at first, seemed to evolve on the stand when he didn't like where the results were going. He didn't do most of the analysis in his report. More than once it turned out that the analysis that was done for him was wrong or misleading.

He repeatedly contradicted his sworn deposition testimony. He contradicted his testimony on the stand about the -- remember, he talked about the DFBETAS, the statistical diagnostics that he had run, at length, saying that he had done exactly what Dr. Burch did, confidently, and then was handed his report and said he was wrong. So what from his criticisms of Dr. Burch can we actually trust?

And, then, on the one hand, we have Dr. Burch using two independent, well-established methods in her field to show a big turnout gap.

What's Dr. Swanson relying on? He told you his primary source is the CPS. He also looked at another poll. Those are unverified surveys. There's no dispute there's a huge overreporting problem. The data shows it. 200,000 plus people in Mississippi more than actually turned out if you just use the CPS numbers. It's massive overreporting.

And Dr. Swanson also doesn't dispute the literature that this overreporting problem is differential on the basis of race. It's well-documented. It's undisputed Black voters tend to overreport at higher rates that biases these unverified surveys like the CPS. We talked about the Ansolabehere study. It shows that. Dr. Swanson said the study was well-taken.

And we never heard -- what we never heard from Dr. Swanson is why can we trust the CPS despite this problem that he admits occurs. Why should we trust these unverified surveys? Why should we rely on them over methods that political scientists actually use?

And defendants may come in and say, "Well, no one has done a study on Mississippi. Maybe there isn't this differential overreporting problem here." But Dr. Burch did do that study. She used the CES. She looked at reported voting versus validated voting. She showed a statistically

significant difference between overreporting for Black and White voters. And Dr. Swanson replicated Dr. Burch's analysis and said she did it right.

So that makes the evidence here of turnout gap actually stronger than it was in the three-judge panel case where we didn't have a Mississippi-specific analysis showing that overreporting. It makes the CPS implausible and untrustworthy for the specific question -- for the specific question of turnout by race.

So rather than explain how the unverified survey should be relied on, Dr. Swanson pulled out one more source -- and then we'll stop on the battle of the experts -- this Brennan Center report, this Internet publication. He didn't know the authors of the Brennan Center report. Can't vouch for the methods. Can't replicate them. Admits the only mention of Mississippi is on a single page in a summary chart. Admits it doesn't actually have an estimate of the level of turnout. Admits it uses a complex methodology for estimating people's race based on their surnames that he can't use himself. Admits it could be unreliable in Mississippi. Admits it's got a 14 percent error rate in predicting Black turnout on average. Could be higher in Mississippi. Admits that they use in their algorithm that 2016-to-2020 ACS census data that the Census Bureau itself said fails the data quality standard.

And the theme in all of this is that Dr. Swanson was

not able to credibly and cogently support his opinions, either the ones criticizing Dr. Burch, or the ones advancing the idea that there's no turnout gap.

So the uncontested and extensive expert testimony, whether or not you believe we've proven the preponderance by a preponderance of the turnout gap, is that Senate Factor 5 weighs in our favor based on all these disparities and the burdens they place on participation. But we have proven the turnout gap as well.

On Senate Factor 6, the evidence shows that racial appeals sadly persist in Mississippi politics. Dr. King testified candidates use them. They can signal the White voters that Black voters aren't "one of us." They can use discriminatory tropes or stereotypes, portray Black candidates as more -- as somehow criminal or unable to follow the law, like the ads we saw against Mike Espy or Latrice Westbrooks. They suggest that Black judges can't be fair. They serve to let voters know a candidate's race even when the candidate doesn't want to let them know, like in the Fred Banks -- the Justice Banks election in 1991. It can invoke troubling elements of the past, like the Confederate flag, Confederate uniforms. They divide voters into "us versus them."

The Court seen a number of these ads in this case discussed in the testimony of Justice Diaz and Justice Anderson and with Dr. King. Our point is not that every candidate does

this. Our point is not that it works for every voter. It doesn't. But the reason we think about racial appeals, the reason we consider this as part of the totality of the circumstances is because, as Dr. King testified, it shows that candidates and campaigns believe it could work. It's relevant evidence of the state of politics and the state of racial division in politics. And that's what we're thinking about.

These appeals are real. They divide and demoralize Mississippians. They have continued to the present day, including in varying forms in supreme court elections -- Reuben Anderson, Justice Banks, Justice Graves, and Judge Westbrooks in 2020. The Senate Factor 6 weighs in favor of the plaintiffs as well.

On Senate Factor 7, the trial record shows the underrepresentation of Black Mississippians in elected office persists, especially in the Mississippi Supreme Court. The record shows that, despite having the highest Black population percentage in the nation, Mississippi has no Black statewide officials. Hasn't had one in 145 years. And the supreme court Black candidates who have run without the backing of a White governor have lost. And there's a stunning level of underrepresentation.

And remember Justice Anderson's testimony, consistent with Dr. King's testimony, he couldn't have won without that appointment. The last time a Black justice who is a sitting

incumbent won a contested election was in 2004 when Judge Graves won. Every time a Black candidate has run outside of that one spot, that District 1, Place 2 spot, they have lost.

So in the three-judge panel case, the Court said Senate Factor 7 weighed in favor of the plaintiffs, but that was tempered because, in the state legislative context, there were a number of Black majority districts. In thinking about proportionality, which *Johnson Against De Grandy* tells us to think about, the underrepresentation was not so extreme. In this case, it's different. It's much more stark. The underrepresentation is extreme.

Let me make one more point on this. It's a simple one. We heard about it from Derrick Simmons, Constance Slaughter-Harvey, from Dr. Bonneau in describing the value of descriptive representation for the legitimacy of state judiciaries, from Justice Anderson talking about his service and his law clerks who have gone on and taken the bench themselves. Representation matters. It matters in public life. It matters in the judiciary. It matters in the Mississippi Supreme Court. Due to the extreme underrepresentation of Black jurists on that body, Senate Factor 7 weighs strongly in plaintiffs' favor.

On senate Factor 8, responsiveness, the evidence is that policymakers are too often unresponsive to the particularized needs of Black voters. There's extensive

testimony about education, its effects. As Dr. King and others testified, the State rarely follows its own funding formula. Education is extremely unequal, as Dr. Burch and Dr. King and Senator Simmons and others testified. And that ties into the evidence that education is intimately connected to voting and participation.

It ties into some of the racial appeals that we heard about, like about Initiative 42. There's plenty more in the record on health, the health needs in the Delta in particular, which could be alleviated by policy action, like expanding Medicaid.

On economic development, Dyamone White talked about how she tried to contact local officials who work on a housing plan. No one got back to her. Congressman Thompson got back to her. We heard about HB 1020 from Dr. Bonneau, how unusual it was to remove the power of local elected officials when the local representatives didn't support it.

We're not here to litigate the merits of these policies. We're not. The relevance is, again, about what nonresponsiveness to the needs of Black voters tells us about the state of the political process and racial division in the political process. Senate Factor 8, on that score, weighs in favor of the plaintiffs.

I'm going to talk about Senate Factor 9 and then sum it up. On Senate Factor 9, the Court looks at whether the

policy underlying the state standard or practice is tenuous. And the word "underlying" is critical here. We look at the actual policy justifications. It's not an invitation for lawyers to come up with arguments after the fact.

The three-judge panel said, in the Mississippi *NAACP* case, we consider the policies used by Mississippi to justify its districting decisions. So what are the policies underlying these lines? We have evidence in the record.

Attorney General Pittman said we have got to redraw these lines, make the population equal. Representative Watson and Constance Slaughter-Harvey talked about that process. They were in politics at the time. They testified on it. The idea was to equalize the population in these districts. That was it. That's what the record shows was the policy rationale last time these districts were changed. Black legislators tried to draw a district that was strong for Black voters. They were voted down.

Defendants could have put a historian on the stand or a legislator or a policymaker to offer some additional evidence. We would have cross-examined them. They didn't do that.

So looking at the one rationale that does appear in the trial record, that rationale no longer holds. These districts are now malapportioned.

And by the way, Dr. Bonneau didn't dispute that

Mississippi is the only state that is still using lines from this long ago to elect to the supreme court.

So I do want to anticipate what I think are going to be some of the policy rationales that will be offered, which I don't think hold water, with the Court's indulgence to address them.

THE COURT: On Senate Factor 9?

MR. SAVITZKY: On Senate Factor 9.

THE COURT: You may.

MR. SAVITZKY: I think they're going to probably rely on Justice Lamar's testimony about how it's good to have big and diverse districts. That isn't testimony from a legislator or a policymaker. It is a policy argument.

And, obviously, she sat on the Court. We don't have any reason to think that the big, diverse districts that are proposed by the plaintiffs operate any differently than the big, diverse districts proposed -- or that currently exist. Any-three district plan is going to have many different places with different local interests and concerns, just like Justice Lamar was talking about.

The illustrative districts include the Delta, also include other areas as well. So there's no interest in having big, diverse districts that the current lines serve that some other three-district plan, like the ones plaintiffs proposed, wouldn't also serve.

And by the way, under the current lines, there are some regional interests that are only in one district. Justice Lamar talked about Katrina and how it spawned all of these legal cases that were of tremendous interest. The Gulf is in one district. So any claim that the concept of diversity requires this particular set of three districts that crack the Delta isn't supported by the evidence. It's not supported by Justice Lamar's testimony.

I would also expect to hear some arguments about how the current lines serve the goal of judicial independence. Mr. Kirkpatrick talked about that. I don't know if Mr. Kirkpatrick was born when these lines were drawn. I understand that he responded to the interrogatories in this case. And I would agree -- I would agree, if judicial independence were actually on the line here, that would be a good policy reason to take a long pause. But it isn't.

First of all, Dr. King testified on this. The idea that the judiciary in Mississippi is structured to maximize independence as opposed to other valid considerations, like democracy and representation, is inconsistent with holding elections in the first place.

I'm a voting rights lawyer. Elections are fine. It's okay to elect judges. The point is only that, from a political science perspective, the rationale that having judges raise money and run for office promotes judicial independence doesn't

hold.

But there's a deeper and more important point, and it's just dispositive of this argument. When Justice Lamar and Kyle Kirkpatrick were asked whether a judge elected from a Black majority district could be fair and impartial and independent just like a judge from a White majority district, they said, yes, of course. And so did Aelicia Thomas, and so did Derrick Simmons, and so did Dr. King. Because there is and can be only one answer. That's the case.

Now I'm going to really sum up. Thank you, Your Honor, for your indulgence.

THE COURT: Thank you. I'm --

MR. SAVITZKY: And I want to -- oh, sorry, Your Honor. Go ahead.

THE COURT: I'm going to give you an opportunity, very briefly, after I hear from the defendants, but I'm cutting into your time on the end because we've used this. I wanted to hear the senate factors altogether.

Now, tell me how much extra time we gave him.

COURTROOM DEPUTY: He went 87 minutes total.

THE COURT: 87 total?

COURTROOM DEPUTY: Uh-huh.

THE COURT: Defendants can have that much time as well.

Mr. Wallace --

MR. WALLACE: I'll try not to use it, but I thank you, Your Honor.

THE COURT: Mr. Wallace, we're going to take a break at this time. If -- during your expansive closing, if you come to a point where you wish to take a break, you may do so. Okay?

MR. WALLACE: Thank you, Your Honor.

THE COURT: We will be in recess for 15 minutes.

MR. SAVITZKY: Thank you, Your Honor.

(RECESS TAKEN.)

THE COURT: Okay. Mr. Wallace, your closing argument.

MR. WALLACE: Thank you, Your Honor.

THE COURT: You may proceed.

MR. WALLACE: Thank you, Your Honor.

This is my light show.

You're seeing something that you haven't seen much in this case, which is the actual statute you're being asked to enforce.

And I note that when the Fifth Circuit entered its most recent Section 2 case two weeks ago *en banc* in *Petteway,* they began where you ought to begin, with the statutory language. However other many steps you go through to get through *Gingles* and senate factors and any other relevant factors you discern, your conclusion, when you get there, has to line up with this language. This is what has to be proven

because that's what Congress adopted.

And the first thing I want you to do is look at the word "standard." It says that "No voting standard" -- and there's a bunch of other nouns there -- "shall be applied so as to result in the denial or abridgment of the right to vote."

What standard is this lawsuit about? This standard is -- this lawsuit is about the standard that consists of the district lines in the Central District of Mississippi. That's what they claim is denying or abridging the right of Black voters to vote. They're not challenging anything else.

There's a lot of red herrings floating around this lawsuit. They complain that Blacks are disadvantaged by nonpartisan elections. Whether or not that's the case, they haven't asked you to order us to go back to partisan elections for judges.

They have told you that -- they have told you that roll-off may disadvantage Black voters because they are at the bottom of the ballot. They haven't asked you to order that the ballot be rearranged, put the supreme court above president.

Dr. King talked about voter fatigue. They haven't asked you to rearrange the election schedule. I think he talked this morning for the first time in this case about runoffs. And there are runoffs in supreme court cases, but they haven't asked you to abolish runoffs.

The only thing they are challenging, the thing they

say that denies them equality is the district lines. That's all you're being asked to look at. And if the district lines aren't denying them equality, this case is over. So that's where -- and by the way, one man, one vote fits in here, I suppose, because there are people inside those district lines.

But the fact is that the 10 percent spread that applies to -- that applies to legislative bodies does not apply to judgeship bodies. The supreme court in *Chisom* cited *Wells vs. Edwards* to that effect. So there's a fraction larger than the 10 percent spread here, but if they thought that denied equal protection, they would have brought that lawsuit, and they didn't. So all we are talking about is the district lines.

Now, the denial must be on account of race or color. And I don't know whether you deal with that issue earlier in your analysis or later in your analysis. But the supreme court, in its *en banc* decision in *Clements,* says that you must consider whether the district lines deny equality on the basis of race and color or on the basis of something else.

And *Clements en banc* decision holds that if the evidence shows that political party is the driver of election outcomes, then this statute doesn't apply. There's nothing wrong with that. How you determine that may be difficult. And *Clements* did not tell you what the burden of proof was or the standard of proof.

There's a case called *Teague,* and that doesn't tell you either, but it -- however you get there, you have to determine that this is being -- I think plaintiffs have the burden of proof on everything, but I acknowledge it may be a little open question at the Fifth Circuit. At the end of the day, you have got to make a resolution. Is this party driven? Is this race driven? That's what you get from the language of the statute.

Now, there's two other things in Section B. Section B says that plaintiffs can get relief "if it has been shown" -- I don't have this memorized -- "that the political processes" -- and the key political process you're worried about here is district lines -- "are not equally open to participation in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Two types of equality. Participation in the political process and electing representatives of their choice.

The key to participating in politics is being registered to vote. And here I did not hear anything in the plaintiffs' closing that challenged the demonstration we discussed earlier this morning that there is a majority Black registration in the Central District. That's what -- that's what the CPS shows. That's what the supreme court saw in *Shelby*. And whether or not the voting population is a little

over 50 percent or a little under 50 percent, the Black spread on registration clearly establishes this is a Black majority registration district, and I haven't heard anything to the contrary.

So if you -- if you register, you have opportunities. Why don't you use it? We heard from their witnesses about the difficulties that they have today in persuading young Black folks to come out and vote. I would not denigrate for a moment the challenges that anybody faces. I have worked in enough elections to know it's hard to get people out to vote. It's hard to convince them to vote for you, but it's a part of the job of elections.

And Judge Thomas says we can get people out for national elections. We can get them out for local elections when their cousin is running for constable or really -- I always think constable elections are more important than presidential elections. And those are the things that you get people out to vote for. The things in the middle, like supreme court and statewide offices, she says, "I can't get them out on it." That's not a denial of equal opportunity. It's failure to exercise equal opportunity.

The named plaintiff, Ms. White, said that, where she works in Hinds County, Blacks and Whites have the same opportunity to get out and vote. She can't get Black folks to do it. She said the problem was apathy. Her word. Not mine.

Because I know it's difficult. But the *Salas* case says if you've got a registration majority and you're not using it, that's not entitling you to relief under Section 2.

The second aspect of equality is the equal opportunity to elect representatives of their choice. And I was very pleased to hear Mr. Savitzky say that we're talking about the facts on the ground today because the facts on the ground today are that, of the five elections held, five seats elected from the Central District and nowhere else -- these are pure Central District line elections -- out of the five, you have three Black elected officials. You have one Black-preferred elected official. And you have only one elected candidate, Justice Griffis, who was not preferred by the Black community. Four out of five looks equal in my book.

And the fact is -- the fact is that they came very close to getting that fifth election -- that fifth seat in 2020. Constance Slaughter-Harvey said that Ms. Westbrooks -- Judge Westbrooks was working hard. She -- you know, she hired a bus. She came to Scott County. And nobody came out to see her because of COVID. They were afraid of getting sick.

I'll bet it was really hard to run for office in 2020 where you have to go knocking on doors and shaking hands and getting people to meet you and get excited about you. So it not only hampered her campaigning but it hampered the ability of people to come out and vote in any way, shape, or form.

So if you're looking at anomalous elections -- Dr. King said the two commissioners were anomalous elections, even though, in a normal year with a normal turnout, they did just fine. The real -- I've got to find another word besides anomalous. The real atypical election is 2020, where candidates couldn't campaign and voters couldn't come out to vote. Would that have made a difference? I don't know. But I do know it's not the district lines that beat Judge Westbrooks because four other people preferred by Black voters have managed to get elected in that district.

And just looking at the statute and knowing what equality means, I think you could stop right there, but there's a lot more case law out there, and we're going to go through it. I'm going to begin with the case law on judges because that's what we're here for.

Chisom says that "Judges in judicial elections are subject to Section 2. Its holding is limited to the meaning of representatives." As you see down here, the statute says "elect representatives of your choice." And the Fifth Circuit initially thought, well, judges aren't representatives so that -- you know, that doesn't apply here. But looking at the statute as a whole, the supreme court says, "Representatives must be construed broadly." Otherwise, you could pass a law that says Black people can't vote for judges, and you couldn't touch it because they're not representatives.

But in saying that judges are covered by Section 2, I think as counsel has admitted, they never said that you're covered in exactly the same way. And the fact is that -- the fact is that judicial elect -- that no one has gone to the end of a Section 2 case about judges and decided to redraw districts. It has never happened. Didn't happen in -- it didn't happen in *Chisom* because Louisiana settled on remand. And it didn't happen in Texas either. And that's how we got to the *Clements* case.

There are two aspects of the *Clements* case that are important, and there were two bases that led to the denial of relief by the Fifth Circuit *en banc*. One was the question of polarized voting. The Fifth Circuit says we have got to decide whether there's -- there's polarized voting in Texas. There's no doubt about that -- is it polarized on the basis of race, or is it polarized on the basis of party? That's what you have to decide.

And they based this decision on Justice White's concurrence in the *Gingles* case. Justice White did not go along with Justice Brennan on the definition -- on the question of what kind of voting matters. Justice Brennan said what I think Dr. King said yesterday, which is the voting is polarized when Whites and Blacks vote differently. If that's what it means, every election in Mississippi and probably every election in this country is racially polarized because

everybody knows that there are differences between the way White folks and Black folks vote.

But Justice White said no. That's not the issue. The issue is whether race is what is driving that division so that there is no way you can overcome it. And Justice White had written the *Whitcomb vs. Chavis* case. He had written the *White vs. Regester* case, and Congress took his language. All of this equal participation stuff is straight out of *White vs. Regester,* written by Justice White.

And he said that means -- that means that a race is so polarized that race is the only thing that matters and that nobody has a chance of overcoming that. Where you see party being more important, that's -- that's what counts, and that's what's illegal under Section 2. And that is what the Fifth Circuit so found in *Clements*.

And the classic line from the *Clements* decision is "Section 2 is implicated only where Democrats lose because they are Black, not where Blacks lose because they are Democrats," 999 F.2d at 854.

I don't know that *Clements* gives you a whole lot of resources for answering that question, Your Honor, but that's the question you have to decide. That's what "on account of race or color" means. They did not decide who had the burden of proof because the Court says it was overwhelming in Texas that party was involved. And I don't think the Fifth Circuit

has yet decided who has the burden of proof. But the question you have to answer is are blacks losing because they're Black or because they're Democrats.

The other thing *Clements* did was to say that a substantial state interest can overcome even the proof of a dilution case. Now, this is generally considered to be part of the totality of the circumstances. Totality of the circumstances, by the way, is the actual language the statute uses. None of this *Gingles* stuff is in the statute, although the supreme court has developed it in an attempt to streamline, I suppose, the adjudication of these cases.

But the real thing -- the real question Congress asked you to do is look at the totality of the circumstances to see if there is equality and a substantial state interest can overcome -- to overcome even a case of a showing of dilution.

In that case, it was the linkages, they called it, between a judge and his jurisdiction. And every -- Texas says everybody in this jurisdiction ought to be able to vote for every judge. That's important.

Now, we don't have at-large supreme court elections in Mississippi. Many of the places that do, that is the linkage issue on which the cases are decided. Everybody subject to jurisdiction of the Court ought to be allowed to vote for them.

Mississippi did it differently in 1832 when we drew the lines across the state. And it may very well have been

200 years ago they decided it's just too big a territory for people to elect judges at-large. We need to get them closer to home. For whatever reason, we haven't changed that.

So we don't have exactly the linkage issue they have in Texas, and I'm not going to suggest that we do. But we do have an interest that Judge Barbour found, which is that, when they did this in 1832, they drew the east/west to diversify the electorate and to keep justices from being beholden to any one group.

Your Honor is not going to read the raw testimony on that, but you said you're going to read Judge Barbour's decision, and that's what -- that's what he found.

Back in 1832, the Jacksonian Democrats that wrote the Constitution would have been very conscious of the fact that they didn't want any judges on the supreme court completely controlled by the rich folks along the river. So they took all of the rich folks along the river and carried them over to the Alabama line where there would be some more folks that might have a chance to come out in a fair election.

So -- and here's the result. If you decide, as Judge Barbour did, that the east/west divisions are a substantial state interest, then here is what *Clements* says. "Proof of dilution, considering the totality of the circumstances, must be substantial in order to overcome the state's interest." That's 999 F.2d 876.

So plaintiffs don't -- if you believe there is a state interest here, plaintiffs don't just have to prove dilution, they have to prove substantial dilution. Here, we think the interest is substantial but the proof isn't.

This is still the law in the Fifth Circuit. The *Fusilier* case, once again, from Louisiana that Mr. Cooper testified in, they refused to break up the parish in the districts. And the most important -- perhaps the most important cases you need to care about from the Fifth Circuit are the two cases that have already approved these district lines.

In *Magnolia Bar*, the Fifth Circuit did -- did not, as I recall, reach the question of whether the east/west lines were substantial. They affirmed on the basis that Judge Barbour was correct in saying that White -- that the White majority, which then existed, did not usually defeat Black-preferred voters in light of the elections of Judge Anderson and Judge Banks. So I'm not telling you that they affirmed the east/west decision. They affirmed them on a different basis. But that was Judge Barbour's decision.

In the *Fordice* case, which attacked the same lines for the public service and transportation commission, the Fifth Circuit looked at it. They assumed that all -- that all three of the *Gingles* prerequisites had been made. And by the way, if you look at Judge Lee's decision, contrary to counsel, he found

that you could create a Black majority district on the basis of the 1990 lines.

The defendants attacked that on appeal. The Fifth Circuit said we don't have to decide that. Because we think he was so right on the totality of the circumstances, we affirm him on that basis. And in that process, they found that the east/west lines were a substantial state interest as they related to the public service commission and as they relate to the transportation commission.

Now, those are the cases that actually deal with judgeships. And the judgeship redistricting cases have gone through *Gingles* basically because they don't have anything else to go through. That's -- those were decided. Those were designed for real representatives, but the courts have assumed they apply to judges, and they worked at them.

But as I told you this morning, you don't even get started down the road in *Gingles* unless you're asking for an additional black majority district to be made. *Bartlett* says that. *Allen* says that. If you -- you know, if the objective is to make a black majority district and you have already got one, you can go home. You're done. There's nothing to remedy.

We have gone through, earlier this morning, the math. It starts with the census data giving you a 51 percent citizen voting Black majority. I think Mr. Savitzky suggested that, well, you shouldn't look -- you know, you shouldn't calculate

citizen majority because the ACS is not the ten-year census. You ought to stick with the ten-year census.

The *Bartlett* case tells you that you have to look at the citizen numbers, as best you can, to see whether you have a minority majority district or whether you don't. You have to look at them. They're the only numbers you have got. And the numbers that the federal government has given us -- again, nobody here has given us and nobody has attacked the ACS as being a bad survey -- gets you to 51 percent. As I told you this morning, I think that by itself wins the case, but we do have a majority district.

So if you've got -- if you get past that hurdle, if you say, well, we already have a majority district, why don't we quit, but you want to go forward, then the first thing you get is whether the maps are any good. And this is controlled by Justice Kavanaugh's concurrence in *Allen* just last year. Just as the Fifth Circuit told us that the *Byers* and *White* concurrence was controlling in *Gingles*, the Kavanaugh concurrence, whatever it means, is controlling here on the question of whether or not you need a map and what a map is for.

I wish he had said more, but he said twice, "The reason you have a map is to remedy cracking and packing." Now, packing is when you put too many Blacks in a district so you're denying Black influence in neighboring districts. Cracking is

when you split up -- and I think Justice Kavanaugh says this -- it's when you split up an existing district and crack it, or you split up an area that could be a district. I don't know what he thinks cracking is. I told you what he says.

I think what cracking is, is what happened in *Hinds vs.* -- I'm sorry -- it's what happened in *Kirksey vs. Hinds County* years ago. That was the redistricting of the supervisors. And Jackson, then, as now, has a whole lot of Black neighborhoods and plenty of places that you don't need a computer to figure out we can make a Black supervisor's district out of this. And instead, the county split up the City of Jackson and all of those Black neighborhoods, carried them out into the countryside, and made five majority White districts. That's cracking.

What has happened in the Delta is not cracking, and the Delta certainly wasn't intended to be cracking because these lines were drawn before there was hardly anybody living in the Delta. But are they, 200 years later, cracking a district that could otherwise be made?

The Delta does not have enough people to control one out of three districts. You go back and look at the history of the Delta. When we tried the original Section 2 case over in Judge Keady's courtroom 40 years ago, they had created a black majority district, including the Delta and a few neighboring places. They did not endorse the Justice Department letter

that was put up on your screen this morning.

The Justice Department says, "Looks to me like you cracked the Delta 40 years ago." That's not the issue. In those days, if the Justice Department says you can't enforce this statute, that was the end of it. The Court didn't have any authority to second-guess the Justice Department.

You get everybody in court and say, "All right. You can't enforce this statute. What are we going to do instead?" And there were a lot of folks there saying, "We used to have a Delta district. We'd like to have it back." The Justice Department said, "We'd like to have a Delta district." And the Court says, "All right. We'll go ahead and give you a Delta district."

The Delta district, including the whole Delta, as Judge Clark said from, you know, Catfish Row in Vicksburg to the lobby of the Peabody, couldn't control one out of five congressional districts. They had a Black majority, which was promptly won by a White Republican. Then Section 2 was passed. The supreme court looked at it again and said, "Y'all look at this again." And what happened is, they said, "All right. Black majority isn't enough. We're going to make a Black voting-age majority." And it still wasn't enough. Republicans won again in 1984. Eventually, in 1986, Mike Espy got elected.

And what that tells you is that what the Court had done was to create an equal opportunity district, just like --

just like the statute says. They created a district that Whites could win sometimes and Blacks could win sometimes, and it depends on what issues were out in the world that year and not what skin color you had. That was a pretty good district that they created, and it doesn't exist anymore.

When we went down to four seats, we had to go to -- we had to redraw everything. That was done by Judge Jolly in his court in 2001, I guess it was. And that wasn't a Delta district. It took what then existed.

By that time, it had moved -- 1984, they took in West Hinds County where Ms. White is from out in Edwards, but they didn't take in Jackson. They said the City of Jackson has nothing whatsoever to do with the Delta. And they kept going south to pick up Claiborne and Jefferson, two other counties that have nothing to do with the Delta.

Now, here we are trying to build a Delta district that is going to control the whole of a single district in a three-seat plan. Delta couldn't control the five-seat plan. Delta couldn't control the four-seat plan. You can make a Black district, which, in fact, is what they are asking you to do, but you can't create a Delta district that is going to control a judgeship.

So this is not like the *Kirksey* case in Hinds County. There is not an obvious Black district sitting there waiting to be made. You have to go pull in people who the Court said

40 years ago -- the Court said 40 years ago, "I have nothing whatsoever to do with the district."

So I would suggest to you there's no cracking here. If there's no cracking, Judge Kavanaugh says, "I don't care about the map. We don't have -- we don't have anything that needs to be remedied."

I would also say, if you believe that Judge Kavanaugh would look at -- Justice Kavanaugh, because he is the controlling vote, would look at these facts and say there's an injury, there's a cracking injury that we need to figure out how to remedy and go with the maps, then I'm not telling you and we've never told you that Mr. Cooper's maps are terrible.

Mr. Swanson said you are using whole counties so you can't create the salamander. It's not as ugly as a lot of things are. I think he agreed that if you're just looking at the compactness of the Central District, then the compactness in Cooper's Plan 1 and in the existing law are fairly close, but there are serious problems when you look at the other two districts because you can't just draw a good district on the west side of the state without having an effect on everybody else.

And if you look at the effect they have in Plan 1, they take Rankin County and Justice Griffis and put him in with Pascagoula. If there is such a thing as an eyeball test, that flunks it. And if your real objective here is to make sure

Justice Griffis can't beat Judge Westbrooks next time, best way to do it is to make sure he has got to run in Pascagoula. So that's the problem with the plans. Not that District 1 is ugly, but it's what it does to everybody else.

The second point is Black cohesion. Nobody doubts that Blacks vote cohesively in Mississippi. We've never said a word to the contrary. And as a matter of fact, they vote much more cohesively than Whites. If anybody is exercised by racial identity in this state, it's the Black votes. You can look at the numbers and see it.

Now, there is a lot of reasons -- there is a lot of reasons for it. Dr. King told you that Bennie Thompson was the best organizer in these parts, and he is. He does a very good job of preserving Black cohesion. If you want to know how they preserve Black cohesion on the other side of the district in Noxubee County, you can read the *U.S. vs. Brown* case. It tells you all about it.

And Senator Simmons, if I remember correctly, said that these days, when we go campaign, we spend all of our time in the Black neighborhoods. We just don't think it makes sense to go anywhere else. And that may be a good, sensible political thing, but these are the things that are driving cohesion. It's not anything that the State of Mississippi is doing or any of the White voters in Mississippi are doing. They're concentrating on preserving that cohesion. So they've

got that.

You go to the third *Gingles* point. Is the White majority bloc voting usually defeating Black-preferred candidates? I never heard Mr. Savitzky say the words "White majority" anywhere in his closing, but that's what *Gingles* requires. It requires that a White majority is outvoting Black folks.

The one thing we know we don't have in this district is a White majority. Whether the Black district is 40 -- whether the Black percentage is 49.9 or 50.1, everybody knows that the Whites are four or five points behind that. You don't need King's EI to tell you that a minority cannot be responsible for defeating somebody who's four or five points ahead of them. It just doesn't make any sense. So there isn't a White minority here at all.

But if you want to know -- oh, and by the way, Dr. King -- if you want to know about racially-polarized voting, Dr. King says, "Well, you know you've got racially-polarized voting when the outcomes are predictable." You can't look at this record and think that outcomes are predictable in the Central District. It is the kind of district the Delta congressional district used to be. It's closely balanced. You can't tell how the races are going to come out, and it depends on all kinds of factors. So if that's his definition of racially-polarized voting, we don't have it.

But I want to start with "usually." Whatever kind of voting we have, what usually happens. And if you go through, starting with now, since Mr. Savitzky says "where we are now," you see who usually wins.

In 2023, two elections in this district for commissioners, Commissioner Stamps and Simmons both won. That's Black-preferred candidates winning in the Central District. They made a suggestion from the bench -- from the box that, well, they won because the National Democrats --

I've had this happen before.

(PAUSE IN PROCEEDINGS DUE TO POWER OUTAGE.)

MR. WALLACE: They suggested there's all of this out-of-state Democratic money coming in. Nobody introduced any evidence that Justice Westbrooks -- that Judge Westbrooks couldn't raise enough money to do a good job.

Justice Lamar told you that, when she ran in 2008, there was a huge "get out to vote" drive in the Delta for the Obama election. All kinds of money coming in. I can't think of any reason why President Biden wouldn't have spent as much money on "get out to vote" as President Obama did. Nobody has told you that "get out and vote" money is the difference between 2023 and 2020.

The real problem in 2020 -- and I'm moving backwards from the 2023 election -- Westbrooks narrowly loses, but the real reason for that, as I've already said, has got to be

COVID. Constance Slaughter-Harvey told you how hard it was. It did not defeat -- whatever problem she had, it wasn't the district lines in 2020 because Black and Democratic candidates further up the ballot, President Biden, Mike Espy running for Senate, they all got a majority in the Central District.

Was it COVID that kept her from effectively campaigning? That's the only evidence we've heard from the box. Nobody has come -- Judge Westbrooks hasn't come in here to tell us why -- what she did and what she didn't do and why she thinks she lost. And it's their burden.

So I don't think the 2020 election, under those unusual circumstances, is enough to disrupt the plan that has been in place for 20 years. But let's keep going.

In 2019, Commissioner Simmons won, a Black candidate winning an empty seat that nobody had appointed him to. He won. Stamps ran a very close race. Worked hard for four years and came back and won it the next time.

And that's what Professor Bonneau told us about the benefits of competitive districts; that if somebody goes out there and almost wins, you can spend the next four years telling people, if you give me a little more help, we can push it over. And that is exactly what Mr. Stamps did. That doesn't look like White folks making it impossible for Black folks to win.

You go back four years more to 2015. Cecil Brown was

the Black-preferred candidate in the public service commission. He won. The other one was won by Dick Hall, who had been in the legislature and the commissioner's office forever. As everybody has told you, it's hard to beat incumbents. He held onto that seat. But four years later when the seat came open, Mr. Simmons won it.

Go to -- I skipped 2016. In 2016, Justice King and Justice Kitchens, both Black-preferred, were elected. And Mr. Savitzky told you uncontested elections don't mean anything because you can't analyze them to see whether Whites would outvote Blacks.

Maybe that's the way a political scientist with a computer looks at it. Anybody who has ever run for office knows that, if an incumbent does not have an opponent, it's because nobody out there thinks they can win. There is no shortage of people who would like to be supreme court justices or constables or anything else, and if you think you can win, you're going to take a shot at it.

The reason that nobody has taken a shot at Justice King is that they don't think they can beat him. And if that doesn't give political scientists numbers to crunch, I say too bad, because real politics tells you that's a Black-preferred candidate that the White folks can't possibly beat.

2012 is their next anomalous race. Earle Banks lost, but unlike other folks, he had two problems. One is that he

had no judicial experience. Dr. Bonneau told you that usually costs you four or five votes -- 4 or 5 percent in a judicial race. He got 44 percent. Had he spent his life in circuit court instead of in the house of representatives, that's another 4 or 5 percent he could pick up.

And the other problem he had -- the other problem he had is he was running against Bill Waller. Bill Waller got a fifth of the Black vote, twice as much as anybody else has gotten in this century, as best I can tell from the numbers we've seen, and that is because when his -- that's because his father -- because his father prosecuted Byron De La Beckwith.

And by the way, we now have evidence that he, in fact, appointed Black folks. Because you saw that ad from Chet Dillard yesterday when he said, "I appointed the first few Black folks to the highway patrol." You look at the dates. That's Bill Waller's administration. Bill Waller, Jr., was going to get the benefit of that affection. So we think, for those reasons, 2012 is as atypical as the Westbrooks race was for different reasons.

So you go back one step further, 2008, King wins and Kitchens beats an incumbent. Black power is working pretty well in this district. I don't see how you can say that the district lines are beating people.

Now, they complain that, if you look at the numbers, the White majority is not providing enough crossover votes to

make up for the Black votes that are not supporting the Black-preferred candidate for one reason or another. I don't see any case that says the White minority, in this case, is under any obligation to provide votes for a Black candidate. It just says you can't usually defeat them.

One thing I wish we knew in this case is why things have changed because we know, when this started, Reuben Anderson got 78 percent of the vote -- 78 percent of the White vote. Fred Banks got 30 percent of the White vote. And Mr. Savitzky says since then everything has changed. Why? It would have been nice to have heard some evidence.

It would have been nice to have heard some evidence that Black candidates are doing everything that Reuben Anderson did, and for some reason, they can't possibly win. It would have been nice to have Judge Westbrooks or somebody from her committee come in here and say, "I went to the president of Trustmark and couldn't get any help. I went to all of the law firm leaders, and I couldn't get any help. I went to the two richest men in Mississippi and couldn't get any help. I talked to all of the ex-governors and couldn't get any help." But they didn't do that.

There just isn't any evidence to show why -- the substantial Black vote that Justice Anderson and Justice Banks got in the last century when they went out and asked for it, why isn't that working anymore? And I don't know. I would

have liked to have heard it.

And I think it's part of their burden to show why a district that was completely winnable for Black folks in the last century is no longer winnable in this century. As I've just gone through the history, I think it is winnable. But if you believe it isn't, then you really are obliged to show what has changed, and they haven't done that.

Now, let's go to whether or not there is racially-polarized voting in Mississippi. Nobody denies that Blacks and Whites vote differently. That was King's definition. But Justice White said that's not enough. You've got to show -- you've got to show not just that they vote differently but that they vote differently on lines of race instead of on lines of party. And that's the prevailing rule in this circuit under *Clements*.

To me, the clearest evidence in this case that party makes the difference rather than race is the Lynn Posey election. Lynn Posey, in 2007, was a White Democrat, and he was the Black-preferred candidate for the public service commissioner. Four years later, he had changed to the Republican Party, ran for the same job. He was not the Black-preferred candidate. That certainly looks like what was controlling there was party.

And, again, we see that Black and White Democrats in recent years have had no trouble getting elected, with the

exception of the COVID year in 2020. It is clearly the case that there are enough Democrats in the Central District that they usually win but not always. We think these facts show party-polarized voting.

I would say to Your Honor -- and these are district court decisions by which you are not bound, but in Alabama, Dr. Bonneau was a witness in their supreme court case. The Alabama court found it's party, not race. Mr. Cooper told you he was a witness in the Arkansas Supreme Court case. They lost that one too. In *Lopez vs. Abbott,* which they cite for some reasons they like, was the Texas Supreme Court case, and they came to exactly the same conclusion. It's party, not race.

Again, the Fifth Circuit itself has not given you a lot to work with in making that decision. But it's a decision you have got to make, and it's a decision that other district judges have found does not apply, does not work in supreme court cases.

Now, that's -- that covers the two parts: Do you usually win? And is it racially-polarized voting or party-polarized voting?

I do think that there is a third possibility, a third consideration that may fit in here and may fit in somewhere else. In the *Salas* case, the district court said that they did not prove the third *Gingles* point because of what -- because the causative factor was the failure of the Hispanic community

to get out and exercise their vote. They're not being beaten by the White community. They're getting beaten by their own failure to come out and vote. *Salas* looked at that as the third *Gingles* point. The Fifth Circuit looked at it as totality of the circumstances, but however you look at it, it's a point that has to be considered.

I won't go over *Salas*. I went over that earlier this morning. But I think *Salas* tells us, under these circumstances, if -- if four out of five isn't enough for you, then you have got to explain why you -- you know, why you didn't take advantage of your registration majority.

Now, let's go quickly through the totality of the circumstances. And I can never remember what the senate factor numbers are, but I know what the factors are. So I'll talk about them.

The first thing you have to know about the senate factors is you can't just list all of the bad things that have ever happened in Mississippi. You have to show how that is affecting political life today. *Clements* says that. *Fordice*, which is the appeal from Judge Lee's case, says that. You can't just give a litany of evil because you -- you have to show how those effects are happening today.

Dr. King didn't think that was the law. He told you yesterday, "All I've got to show you is there are these offensive advertisements out there. I don't have to show you

they did anything." And we've had the same problem with their other experts. We've had a lot of explanation -- we've talked about the historical difficulties that people used to face under poll taxes and literacy tests and all of the rest of it, but you've got to show is there something that is still happening today that is affecting elections.

And I think we've asked every expert who went up in that box, "Can you tell me of anybody who could not vote because of any of these historical and socioeconomic factors?" And the answer has always been, "Well, the literature tells me that this is likely to happen." I can't cross-examine the literature. You're on notice from *Clements* and *Fordice* that you'd better show how this happens in the real world. And I haven't heard anything to connect literature theory to the real world.

Mr. Savitzky likes to say -- he likes to rely on the *Teague* case that says, if you prove the first three points, then you're generally going to win. That was promptly corrected by the Fifth Circuit after *Johnson v. De Grandy* because they said the same thing to Judge Senter in the *Clark* case. I can't remember which county they were redistricting up here, but they told -- they said that to Judge Senter. Says, "We've got all three points made so we think -- we think you ought to take this back and fix it."

And then the supreme court decided *Johnson v.*

De Grandy, which says you are not under an obligation to create all of the Black districts you could create. And in *Clark* too, they said, "Well, Judge Senter was right. We missed that one." And they went on and reversed him anyway. But the so-called presumption does not exist.

So let's talk for just a second about history. We don't dispute the facts. As I said once already and as Mr. Savitzky said once already, Faulkner wins this argument. The past isn't dead.

And Dr. Campbell, to his credit, after going through all of the terrible voting mechanisms we've used to keep Blacks from voting in Mississippi, gave us a list of the bad ones that he thinks still affect the real world. He said felon disenfranchisement is a bad thing; voter ID is a bad thing; and the difficulty of getting absentee ballots is a bad thing. So let's go through them.

Felon disenfranchisement, whether it's a bad thing or not, is illegal. The Fifth Circuit twice *en banc* has held there is nothing wrong with Mississippi's felon disenfranchisement law. The 15th Amendment itself says on its face you can disqualify felons from voting. There's just no constitutional problem here.

Then voter ID. Voter ID has been upheld as constitutional by the supreme court. Mississippi worked very hard on it. He put -- former Secretary Hosemann's article, he

worked very hard to try to come up with something that would not disadvantage anybody. And the Justice Department apparently gave him a hard time but no litigant has. You know, if the ACLU or the NAACP thought that voter ID was no good, they could sue him, and they haven't. Voter ID is legal in the nation and in Mississippi.

And finally is absentee ballot. I really don't understand this one. Nobody has suggested that there's any such thing as a federal right to an absentee ballot. If there were, there's no indication that we would be denying it. Actually, we have absentee ballot rules in Mississippi. And people very often suggest, "Well, we ought to make it easier to vote because absentee ballot fraud is not a problem."

In Mississippi, we have read *United States vs. Brown*. We know that absentee ballot fraud is a problem in Mississippi, and we are entitled to try and protect against it. And while these requirements may be difficult, nobody has suggested there's anything illegal about them. Once again, if they were illegal, somebody would sue.

You can't come in to this case suing about district lines and try to get an adjudication that felon disenfranchisement is illegal, that voter ID is illegal, and absentee ballots are illegal. You don't get drive-by constitutional litigation like that. Zero plus zero plus zero is still zero. I don't think there is a law that says three

legal laws add up to a Section 2 violation. But if there is one, I'm sure Mr. Savitzky will tell me about it when he gets back up.

Again, *Fordice* says you have to show that these historical factors actually hampered the ability of minorities to participate. And what Judge Lee has said in that case is that, whatever problems we have, they're not affecting turnout; they're not affecting participation. Blacks and Whites have reached parity 25 years ago. They still have it. None of these problems, if they exist, were a Section 2 violation.

We go on to socioeconomics and participation because those things are tied together. The staff report says that, if Black participation is depressed, then you can look at all of the socioeconomic factors. And Your Honor thought there was some evidence of suppressed participation and let those factors in. But, once again, you've got to show do they prevent somebody from voting. And I didn't hear any testimony to that effect.

Again, Burch cited general principles. The literature shows that it makes it harder for Black folks to vote, but it doesn't show that Black folks failed to overcome those hurdles here in Mississippi because she didn't come down here and she couldn't look.

Now, Mr. Savitzky asked Dr. Swanson, "Is it a reasonable hypothesis that -- that the socioeconomic -- the

socioeconomic issues depress Black turnout?" And Dr. Swanson says, "Yeah, it's a reasonable hypothesis. You need to go test it."

Mississippi State tests that hypothesis every year. It has a survey and says, "Are you participating in politics? Do you usually vote? Do you not usually vote?" That's the question Your Honor needs to know the answer to, do people usually vote.

And the answer that Mississippi State gets is that Black folks usually vote more often than White folks do. Nobody has said that the literature says that the question Mississippi State asks is a bad question that gets bad answers. You haven't heard a word about that.

You didn't hear a word about it in Mr. Savitzky's opening because there's nothing wrong with the on-the-ground, door-to-door survey that Mississippi State tests -- does -- does every year. So they're asking the right question that you need the answer to, and Mississippi State is a good place to get it.

Judge Lee told us the same thing 25 years ago when he told us that we have reached parity and the Fifth Circuit affirmed. What he found 25 years ago the CPS still confirms, that Blacks and Whites are at least at parity. Mississippi State confirms that Blacks and Whites are at least at parity. And the Brennan Center, only two years ago, shows that they are

at least at parity. In 2020, they found Blacks a little ahead. In 2022, they found Blacks a little bit behind. Nobody says there's a huge gap -- gap there.

So they attack -- they don't attack Mississippi State. They do attack the CPS. And they say the CPS is bad because people tell you they vote more often than they do. There are false positives in there. Yes, there are a lot of false positives. Every time you go to the dentist, the dentist asks you, "Do you floss?" And I bet a lot of people in this room have given a false positive on that.

So, yes, there are false positives in the response that the CPS gets, but they're not relevant unless the -- because if Blacks and Whites overreport in the same measure, you take out the overreporting people, and you've still got a Black lead on turnout.

Now, there is literature, once again, that says maybe Blacks do overreport more than Whites. And we didn't lie about that. Our experts acknowledged that literature, but that literature isn't here to be cross-examined.

And when Dr. Bonneau was asked why that was, he said, "I can't think of any reason why Black folks would give worse answers than White folks." Dr. Burch read out some reasons that I think came from the Ansolabehere report. And I asked her, "Can you tell me why White folks wouldn't be affected to the same extent by those reasons?" And she couldn't. So if

there is a difference, nobody can explain why it happens, which makes you think the difference may not be quite as real as you think it is.

Now, they rely on Ansolabehere. And he didn't study Mississippi, and they want you to believe that the other southern states he studied are just like Mississippi. I often tell my Northern friends, the South isn't one big Mississippi. Even Mississippi isn't one big Mississippi.

And to say that, because there's overreporting in North Carolina, there must be overreporting in Mississippi doesn't necessarily follow. And, indeed, there's reason to believe it's not true because the records show, compared to other states in the South, Mississippi is doing a much better job of getting Blacks to register and to vote than anyplace else.

If you look at the *Shelby* decision, there's a 3.8 percent Black advantage on -- on -- on registration. If you look at the Brennan Center report, Blacks are ahead in Mississippi and no place else in the South. So is there a reason Mississippi may be different? Well, I think you've heard something about that too.

Dr. King said Congressman Thompson is pretty good at getting people motivated. He works very hard. He sends out those sample ballots. He picks people up. It works. I think there's every reason to believe that the efforts being made on

behalf of local Black political officials really is bringing out a better turnout than anywhere else in the South. In any event, there's no study in Mississippi that says there isn't.

Mr. Savitzky says, "Well, now there is a study in Mississippi because Dr. Burch did the math." And I want to talk about Dr. Burch's math for just a minute, but I want to begin by saying something about both experts.

When this case started, Dr. Burch relied on the CPS. We got Dr. Swanson because, given all of his experience with the census, he knows all about the CPS. Then she found out -- as a matter of fact, he knows enough about the CPS that he could show her why she used it wrong. And she said, "All right. I have to start over." And then she went off to CES and other things.

And, of course, both of these experts were talking about something they don't usually do. She told you that she had never used King's EI in her published work. Dr. Swanson would absolutely confirm the same thing. So you've got two people who were hired to talk about the CPS who had to try to talk about something else.

It's not a question of credibility. Dave Swanson is as credible as they come. Dr. Burch is as credible as they come. They were wrestling with the subject matter that neither one of them is terribly familiar with. And that may not be much use to you, Your Honor, but those are the facts about

where we are.

So she looked at the CES. And let's talk about what the CES is. And I was so happy to hear Mr. Savitzky this morning arguing about multiple hearsay because the CES is multiple hearsay in both directions. If you talk about where the survey comes from -- and this is right -- this is in evidence -- the CES report says we got an outfit called YouGov to do the survey. And YouGov does this survey not by on-the-ground door knocking but by connecting with people who have -- who have Internet access.

And as Dr. Swanson has testified, given his experience on this exact subject with Indian communities, underprivileged folks tend not to have Internet access. And an Internet survey is going to -- is going to disproportionately exclude, in Mississippi, many Black voters.

So are there ways to correct for that? Probably. But we don't know if it was done here because plaintiffs don't -- Dr. Burch didn't know anything about YouGov, didn't know anything about how they did the survey. How they did the survey in the year of 2020 where the Census Bureau couldn't get good surveys done, can you really rely on the hearsay you're getting from YouGov? I think it's unlikely.

Then she's getting the hearsay from CES, and it gets hearsay in another direction. It takes these names, whether they're a good sample or not, and compares them to public

records. Now, whether that's any good depends on the public records, among other things.

Mr. Kirkpatrick told you that, if a poll worker makes a mistake and records the wrong person as voting so that somebody who didn't vote gets -- somebody who did vote gets recorded as not voting, that goes from the poll worker to the county election commission. It goes to the secretary of state's office. And that error is maintained in the secretary of state's office. Not from any fault of the secretary of state, but he's just recording the hearsay he gets from two steps down the chain. And then that hearsay goes to CES, and they're the ones who have to look at it, try to figure out what it says, and match it up to the hearsay they got from YouGov.

Now, that seems like a multiple hearsay problem to me. And the answer that you get from the witnesses is, "Well, academics rely on CES." And for what academics are being asked to do, maybe it's perfectly reliable. This Court isn't an academic. This Court is not looking at opinions. This Court has to know facts, who voted and who didn't.

Those are not a matter of expert opinion. That's a matter of fact. And whether those facts were properly recorded and properly considered by CES is not in the record here. And whether those facts were applied to a survey that was validly done by YouGov is not in the record here. I suggest to you that you can't rely on CES at all.

So when she took the validated voter information and looked to see how many people had voted and how many people hadn't and whether White vote was more -- was better reported than Black and White, she's looking at bad data, and she's looking at data that excludes a large portion of the Black community in a year when it was hard to get data. So, yes, the only evidence you've got of overreporting in Mississippi is math that Dr. Burch did based on the multiple hearsay that Mr. Savitzky was arguing against earlier this morning.

In any event, she went on and did the same math on turnout relying on CES, and it didn't tell her very much. I asked her about her Model 1.

And I said, "You look at all of these decimals and all of these asterisks, and what does it tell you?"

And her answer to me is, "It tells us that Blacks do vote a little less than Whites."

"Does it tell you how much?"

"No."

The 60/46 in her report may be her best estimate, but the answer -- "Does it tell you how much?" "No." And in a district in which Blacks are ahead in registration and ahead in population, if it doesn't make much difference, it isn't going to change that very much.

She also went down and did -- and did a different calculation based on secretary of state numbers, but she told

you when she did that, on a statewide basis, there were a quarter of a million people missing. She didn't tell you why those quarter of a million people didn't infect her calculations. That seems like a lot of people to miss. And she ought to be able to explain, well, you know, those quarter of a million people did not affect the outcome "because." And I don't think I ever heard her say that.

And then she looked at the Central District where -- in particular, where I think there were 70-some-odd-thousand people missing. And she says, "Well, I knew I had a problem, and so I tried to solve the problem by adding -- by reducing the CVAP by 11 percent." I don't know why that works, but that's what she did.

And when she got that, she got numbers that were no good. That's her Table 3 where the Black turnout has a spread of, like, 23 to 83. And the White has their own spread. It's still a big spread. And, you know, if those spreads overlap, you can't really tell who's ahead. It's -- so I don't think they have demonstrated turnout when you get into the details or the numbers and see where those numbers came -- came from.

So socioeconomic problems are real, but they have not shown us that depressed turnout or depressed Black participation is real. If it is, maybe it's caused by socioeconomics. There were socioeconomic problems in *Salas,* and the Fifth Circuit said, "You got a majority. You got to

tell me why you couldn't use it." The fact that they didn't use it isn't enough to get a Section 2 violation.

I want to get quickly into the racial appeals. Again, Dr. King says, "Well, it doesn't matter whether it had any effect. All I have to do is show it happened." The effect is the people who made them got in big trouble.

The candidate who ran -- who ran that language against Reuben Anderson got beat. The candidate who ran that ad against Fred Banks got beat. The candidate who ran ads against James Graves got beat. Racial appeals are apparently -- I don't know what a legislator in Tunica has to do with this case, but the legislator in Tunica who talked about welfare checks got beat.

Dr. King says that doesn't -- and by the way, Dr. King says, "I can't tell you whether any of these people were intentionally doing race discrimination. Anyway, it doesn't matter. If it looks problematic, it's a racial appeal."

And anybody -- a racial -- a racial conservative is anybody that believes in limited government. Presumably, if you do an ad about limited government, that's a racial appeal. I'm sorry. I don't buy it. Anything that looks like a racial appeal in Mississippi is hurting you, not helping you.

And, again, Dr. King says, "Yeah, you can get him elected is the Rule 1 of politics." All of these ads violate Rule 1.

Now, I do want to say one thing about -- I want to say two things about the Latrice Westbrooks PAC ad. What is -- Kenny Griffis didn't do it. I mean, Kenny Griffis, apparently, whatever his intentions may be, is smart enough to know that racial appeals don't work in the Central District. So holding him or the State responsible for what a PAC did, when a PAC has the authority under the First Amendment to campaign, seems to me to make no sense.

But that ad, there's no racial appeal in there. It was talking about crime. And, yeah, in the year that George Floyd was killed, crime was a big deal on both sides of the fence. And you cannot be forbidden to talk about a legitimate issue because somebody might think it's a racial appeal.

The other half is that it had Judge Westbrooks's picture. Yeah, it had Judge Westbrooks's picture. You know what else has Judge Westbrooks's picture? Bennie Thompson's sample ballot. It's in the record.

Judge Reeves down in Jackson loves to apply the goose/gander rule. It seems to me, if the goose can put Latrice Westbrooks's picture on the ballot, then the gander can put her picture anywhere. These aren't racial appeals. These are legitimate. If it's a real racial appeal, the history shows it doesn't work.

Let me say a word about responsiveness. We still have problems in Mississippi. We have difficulty -- differences

about how those problems have to be addressed. That's why we have elections for the legislature. That's not why we have elections for the supreme court. Nobody has said that the supreme court has anything to do about any of the responsiveness problems they have complained about. And so all of that, it seems to me, is -- is beside the point.

Now, we've got to get to -- we've got to get to state interest. They've got a letter from the mid-'80s from Attorney General Pittman saying that you need to draw new lines for one man, one vote purposes. You know, I was a big fan of Chief Justice Pittman, but he wasn't a legislator any more than Kyle Kirkpatrick was a legislator. And what he -- the only legislator I know in this building is Judge Mills, and I don't think we can go ask him. So we don't know for sure what they were thinking about in 1887 -- in 1987, and Judge -- Attorney General Pittman's letter doesn't tell us anything about that.

But Judge Barbour's opinion, which you've said you are going to consider, does. And Judge Barbour looked at the supreme court lines, and he said these were set up by Jacksonian Democrats to balance the rich folks with the dirt farmers, and anybody that wanted to be on our supreme court had to campaign with rich folks, and they had to -- had to campaign with dirt farmers.

The nature of the river counties and the eastern counties has changed in the 200 years, but there is still

differences. Dr. Swanson looked at those differences and drew you a picture of socioeconomic need and resources distributed all about the state.

And to the extent -- to the extent Judge Barbour is right, he's confirmed that the needy counties are dispersed among three districts, and the prosperous counties and the middle counties are dispersed between three districts. If that kind of diversity that Judge Barbour blessed is a good thing -- and I think it is -- then it still holds true today. There are still differences on both sides of the state.

So I'm not telling you that Judge Barbour -- that the Fifth Circuit affirmed that part of his opinion. They didn't get to it. When Judge Lee said the same thing, they did affirm his opinion and said east/west is a good way to do the commissioners. So I don't think there's any reason to think that the supreme court is any different from the commissioners. East/west is a sensible way to do.

Does it have an effect in the real world? Justice Lamar said, "Yes, it does." Justice Lamar said that having different groups in different places gets you out to meet different people and gives you different considerations. And that's important for a judge when you're running for office. We've heard a lot -- our witness and their witness didn't like judgeship elections much at all.

A friend of mine just retired as chief justice of the

Michigan Supreme Court. He once told me that there's something humbling about standing on a voter's doorstep trying to explain collateral estoppel. Not everything about elections may be good, but that kind of diversity in campaigning is good. And Justice Lamar said that she believes it's good for judicial independence.

Now, the question is not can a judge elected from a black majority district be fair. We have three of them right now. Everybody says they're all fair. But if you load up everything on the west side of the state, then you don't have that diversity anymore. And one particular part of the diversity you don't have is utility work.

Justice Lamar volunteered that utility cases are things that may be politically sensitive. And if you do what plaintiffs work -- want you to do and put the entire Entergy service area into one district, it's going to have an effect on how judges think.

And if it doesn't -- Judge King told you this problem. He said, "Everybody may be as fair as you possibly can." He was talking about raising money. He said, "It may not have any real influence at all, but it does change the perception."

And if the perception is that a judge is unduly influenced by money or unduly influenced by one political party or faction, that perception is a problem. And that is a perception that, for 200 years, we've avoided in Mississippi

because we have diverse, in the real meaning of that word, districts going east and west.

So I think Judge Barbour and Judge Lee were both right that east/west is a valid and substantial state interest. And that takes us back to *Clements*. "Proof of dilution, considering the totality of the circumstances, must be substantial in order to overcome the state's intent."

Even if you believe everything that plaintiffs have put on, the fact that they lost one election in 2020 and one election in 2012 by close margins and unusual circumstances, if that proves dilution at all, it strikes me that it's not a very substantial dilution. And what the Fifth Circuit has told you is, if you've got a good state interest, you ought to protect competitive, unless you've got a strong dilution case that requires you to override it.

These seats -- these district lines, which is all you're talking about -- anything else that causes problems for Black candidates is not in this lawsuit. These district lines were held to be sufficient in 1992. They were held to be sufficient in 1999. And all that has happened since then is that Black-preferred candidates occupy two seats instead of one. There's no dilution here, certainly not enough to overcome these substantial interests in preserving independence and preserving the perception of independence.

I want to conclude by reminding the Court of something

the Court probably remembers. When Sylvester Croom took over the Mississippi State football program several years ago, you'll remember the T-shirts that said "The only color that matters is maroon."

In this court, in our supreme court, and every other court, the only color that matters is black. When Justice Anderson sat in that box and pointed at the pictures on these walls, what do you see? You see black. They are dominated by black robes. The people inside the robes are entitled honor for the work they do, but the real message of every one of these pictures is that the black robe ensures fairness and equal treatment for everybody.

The robe -- the black robe is designed not to -- to enhance communities of interest but to suppress the differences that are drawn between one person or another. When you put -- a judge puts on the black robe, he or she is agreeing not to follow your personal principles. You're agreeing not to care about your personal characteristics, whether it's your skin color or anything else. You are agreeing not to be the servant of a community of interest but to be a servant of the law.

COURTROOM DEPUTY: Five minutes.

MR. WALLACE: And that is what is happening on our supreme court. Both Justice Diaz and Justice Lamar said all of those people up there are doing the right thing. He said they're trying to serve the whole state. They are not trying

to represent a community of interest. They are trying to serve the law. And they are not broken up into factions, whether they're party factions or racial factions or any other factions. Our supreme court and the system we've used to elect them for 200 years is doing what we want to do. No witness said otherwise.

Senator Simmons, who is here today, confirmed it. He says, "You know, I think the judges are perfectly fair." You know, I -- they are. I'm not criticizing them in any way, shape, or form. We have a competitive Black majority district, and it's a district that nobody can take for granted.

Senator Simmons said one other thing. He said he tries to convince individual Black voters who don't know the Court as well as he does that they're getting a fair shake. And he says it's hard to do because they are not entirely convinced that White judges can be as fair to them as Black judges are. And Senator Simmons says, "You know, that's not true. They are as fair, but I understand why they feel that way."

Dr. Bonneau understands why they feel that way. He volunteered that descriptive representation, which means being represented by somebody that looks like you, can be important in our democracy. But as he said about nonpartisan elections not being worth the squeeze, the question is whether it's worth the squeeze to try to -- to try to change the district lines in

order to provide descriptive representation.

Whether it's a good idea or a bad idea, the Voting Rights Act doesn't require it. There's nothing in the Voting Rights Act that says we want to put people out there so voters will feel better about the folks they have to represent them. The Voting Rights Act says what we want is to have an equal opportunity to participate and have an equal opportunity to elect. And they've got that, and the consequences are we have a good supreme court that everybody likes.

It's hard on Senator Simmons to convince those voters of what he knows and has testified to be the truth. I understand that. But I don't think anything in the Voting Rights Act says we solve that problem by pretending we can segregate election districts and not have that have an effect.

And Dr. Bonneau told you what that effect was going to be. He told you what happens when you have noncompetitive districts. Right now we've got a very competitive district. Black-preferred candidates win most of the time but not all of the time. We have a district where everybody has to pay attention to all of the voters or they're going to lose their jobs.

And Dr. Bonneau says, when you get districts where you don't have to pay attention to the opposition, where you have one group safely ensconced over here and another group safely ensconced over here and they never have to pay attention to

anything else, what you get is partisan rank. It gives you polarization. It feeds on itself, and it gets worse election after election.

For 200 years, we've avoided that with this plan. We have a good supreme court that everybody admits is doing its job. Listen to Professor Bonneau. Do not turn our supreme court into the United States Congress.

I thank you, Your Honor.

THE COURT: Thank you.

Mr. Savitzky, I'm going to give you five minutes.

MR. SAVITZKY: Thank you, Your Honor. I appreciate the Court's indulgence, and I'll try not to speak fastly but cover the points that I want to cover.

Just a couple of things to respond to Mr. Wallace.

First of all, just to be clear, if we prevail -- if there's a liability finding, you don't draw the districts. The legislature will draw the districts, and they will get to decide how they want to configure a black majority district. And we've shown you can draw one that has that east/west configuration that's made of whole counties. So that will be their decision.

On Justice Kavanaugh, the evidence is that there is cracking here. The Delta is cracked. And he was in the majority in *Milligan*.

On the question of party versus race, I think we've

addressed that extensively. I think the three-judge panel addressed it extensively. They addressed the *Whitcomb Against Chavis case.* They addressed *Clements.* The cite on *Clements* is pages 860 to 861 where it talks about the very different circumstances, where you had multiracial coalitions competing in politics. That's not what we see on this evidence.

Mr. Wallace said why -- they have to say why. I don't think we need to prove why there's racial division in Mississippi politics, but the evidence does show it. It shows that there's extreme polarization. It shows that there is a historical explanation for that, as the witnesses testified to, and it shows that the race of the candidates matter.

And by the way, Mr. Wallace mentioned Lynn Posey, Lynn Posey and those two elections. The race of the opponent changed. Race of candidates matters. That is what the evidence shows.

We've talked about participation in politics. They assert that there is a majority Black registration rate in the district based on the unverified CPS surveys, not on voter rolls, and, again, the math doesn't add up. If it's a majority Black registration district and there's high levels of Black -- greater Black participation, Black candidates would win every time. Black candidates would win every time. But they're not. The evidence shows that, more often than not, they're losing. Their theory doesn't add up.

Two more points, Your Honor. I know I have a short amount of time. Three more. One is very quick, which is just, on the 1987 lines, we don't just have a memo from Justice Pittman. We also have testimony from Percy Watson on that point and from Constance Slaughter-Harvey. There was live testimony. Percy Watson was in the legislature.

Two more points. One is on the historical reasons on 1832 and the 200-year-old nature of these districts. There's no evidence of a continuing state interest in dividing the lines in order -- in order to compensate for the rich folks along the river, as Mr. Wallace described.

The history is the rich folks on the river, as he described, were the landowning gentry who owned slaves and whose descendants live, in large proportions, in the Delta today. And so it would not be a historical irony but a historical tragedy to say the desire to limit the political power of that planting class so long ago, in the 1800s, would justify vote dilution that harms the descendants of the enslaved today.

The strength of our case on the *Gingles* factors, on the senate factors, on the established law would easily overcome any interest in maintaining lines based on what folks thought 200 years ago in that regard.

Let me make one last point, please, Your Honor. And I just want to go back to Chief Judge Barbour in *Magnolia Bar*,

thinking about history and about the present.

Chief Judge Barbour was looking at these districts in 1992. He was looking at a world where the lines had just been redrawn, where Constance Slaughter-Harvey was the Assistant Secretary of State For Elections; where Reuben Anderson, the first black graduate of Ole Miss law, was now a former justice; where Justice Banks was sitting on the Court, having won with 30 percent of the White vote despite being on the national board of the NAACP.

And looking at that world, when I read Chief Judge Barbour's opinion, it's brimming with hope. It's brimming with hope. He says, "The election of Anderson and the election of Banks to the Mississippi Supreme Court were not aberrational but evidence that Whites will not necessarily vote as a bloc for White candidates having Black opponents in Mississippi Supreme Court elections so as to usually defeat the minority's preferred candidate. The success of these Black men represents not merely personal triumphs but triumphs for the Voting Rights Act itself."

And more than 30 years later, Your Honor, Reuben Anderson took the stand in this courtroom. He referenced that same hope, that the days -- the hope is the days of racial division and polarized voting were receding. He said, "I was always hopeful that an African American would be elected statewide in Mississippi." That's what he testified. That's

how he felt. But today the world looks different. He testified that his hope has faded. He told the Court, "It won't happen in my lifetime."

History didn't take the path that Chief Judge Barbour and Reuben Anderson thought it was going to take. Consistent with all of the testimony from the witnesses you have heard who took the stand, Justice Anderson testified that today, where we are now, where history has taken us, race is number one in politics. That is what he testified.

And I want to be clear, hope isn't dead. The hope isn't dead. Justice Anderson testified he doesn't expect to see that in his lifetime, but he still hopes for it for his daughter, for his grandson. He's not -- he said he's not optimistic, but he does say he has that hope.

And, Your Honor, the Voting Rights Act embodies the hope that Chief Judge Barbour and Reuben Anderson and so many Mississippians have felt. It was reauthorized again and again with the support most recently of Senators Lott and Cochran and the signature of President Bush and reaffirmed by the supreme court just last year. It's the promise to ensure equal opportunity even when -- as in Mississippi today, as the evidence shows when it comes to supreme court elections, even when politics is deeply polarized and divided along racial lines.

The witnesses you heard from in this trial represent

Mississippi's past, as Justice Anderson does, and its present and its future, people who have served and want to serve the state, who love their home, people like Derrick Simmons and Dyamone White. These lines don't do right by the Mississippians who came and testified in this courtroom. They fragment the Delta. They dilute the voting strength of Black Mississippians. They grossly underrepresent Black Mississippians in the state's highest court. They don't do what the law requires. They don't meet Section 2's promise.

The trial evidence proves our case. A finding of liability is justified under the case law, and it would be just. So we ask the Court to find in our favor and to put a remedy into place.

THE COURT: Thank you.

Mr. Savitzky, and, Mr. Wallace, those were excellent closing arguments, and they helped this Court. I don't think it's necessary that you file a post-trial brief. I think I have been briefed. Okay? So that's going to be very helpful the way you have laid it out in the summary.

MR. WALLACE: My wife will be glad to hear you said that.

THE COURT: I do wish that you would file findings of facts and conclusions of law. You tell me what you need. Two weeks? Three weeks? Whatever you think. I've taken pretty good notes and got real-time transcription. So, you know, I'm

looking for those things that you think are most important.

MR. WALLACE: Judge, sometimes you get what you ask for and wish you hadn't. The Jackson airport case has gone back to the Fifth Circuit for the -- either the third or fourth time, depending on how you count it, and they just granted my motion to expedite. So I owe them a brief in the next two weeks. We can get this done in 30 days.

THE COURT: Okay. Is 30 days okay with you, Mr. Savitzky?

MR. SAVITZKY: Yes, Your Honor. 30 days will be fine. Thank you very much.

THE COURT: Okay. So submit your findings and your conclusions of law. I've got a couple or three questions, and some of this, honestly, I think you have addressed in your closing, but just to satisfy myself and my very, very studious clerks, I'm going to ask these questions.

So in -- there's a recent *en banc* decision, *Petteway,* that you have mentioned. The Fifth Circuit rejected the use of minority coalition claims and Section 2 claims. That opinion applies the ruling in the context of *Gingles* 1. What is the plaintiffs' position as to the applicability of that opinion in light of Dr. Burch's EI analysis?

MR. SAVITZKY: Yes, Your Honor. And if there's a particular aspect of the *Petteway* decision that the Court would like me to address, I'm happy to.

As I understand it, the *Petteway* case deals primarily with, as the Court says, *Gingles* 1 and with the ability to draw an illustrative district for *Gingles* 1 purposes that combines -- that's a minority majority district but isn't a black majority district or a Hispanic majority district. So in *Galveston*, what was offered were majority minority districts where the majority of minorities was a combination of Black and Hispanic voters.

So that's not applicable here. This is a case where we're talking about drawing a black majority district. And so the idea of what -- they're called coalition claims, and this issue has been litigated -- was litigated in the Fifth Circuit and in other areas as well. But this isn't a case involving coalition claims. So I would say that the thrust of the *Petteway* decision is not applicable in this case.

THE COURT: So before you even respond, let me just say, our recollection of Dr. Burch's testimony is that she testified that she looked at White versus non-White, as well as non-Hispanic, Black alone and in combination versus Black. Does *Petteway* have any impact on her calculation that include non-White together?

MR. SAVITZKY: So -- and I don't think so. I think that *Petteway* applies to the question of, are you -- are you able to hit that 50 percent plus requirement for the illustrative district that you are drawing in terms of

population by combining different racial minorities? That's the question.

The analysis that Dr. Burch is doing -- and, again, I think -- I'm not sure if it's the same analysis, but it's certainly not a *Gingles* 1 analysis. It's not an analysis of the population in the district. So if you're looking at turnout -- and I think that's what the Court is referencing -- that's a different question; right?

And so the ways that political scientists will look at voter turnout, the extent to which, well, if I use the EI methodology, I'm going to need to look at one group versus the other. So look at Black versus non-Black, White versus non-White. It's a different question entirely than the composition of an illustrative district in terms of the population demographics of the district.

THE COURT: Okay.

MR. WALLACE: I agree with counsel that it has no substantive bearing on our case. You mentioned Dr. Burch. I think the -- as I understood her testimony, she did not compare Black directly to White because of the limitations of the data she was working with and the system she was using. And she had to put those 20,000 Choctaws, Hispanics, and Delta Chinese somewhere. So sometimes she put them with the Whites, and sometimes she put them with the Blacks. That may go to how precise her calculations are, but it's got nothing to do with

Petteway.

THE COURT: Okay.

MR. WALLACE: As I started, *Petteway* is procedurally important because it tells you to begin and end with the statute, make sure you connect what you're doing to what the statutory language says.

THE COURT: Thank you. Could I ask you to move that poster for me? Just put it down so I can see who's in the gallery.

So we have heard a lot of testimony -- this may be stating the real obvious here. Okay? So bear with me. We've heard lots of testimony about the Black voting-age population in District 1. Seems that the parties are using different data. It's pretty obvious.

To reach a conclusion, like the plaintiffs concluding that it's not currently a majority Black district, Black voting district, and the defendants concluding that it is -- and that's in your closing. Okay? Y'all are looking at it differently.

So here's my question for the defendants: Even if the Court were to accept your conclusion, does that preclude a Section 2 vote dilution claim?

MR. WALLACE: Well, I'll go first this time, Your Honor.

I don't think we are using different data. I don't

think we are using -- we have a stipulation. If you look at the census data, including the American Community Survey, which nobody has challenged, then the Black citizen voting-age population is 51.1 percent. The question is should that number come down because there are some Blacks who can't vote and other people who can't vote. And they don't even really have any data.

We have a 56,000 number that Mr. Cooper says he got somewhere, and we have to take suppositions about who lives where and who's still alive and how to deduct them. So our --

THE COURT: So let me ask you that. Is that because -- y'all know this case so well. Are we correct in that we do kind of start at the same place --

MR. WALLACE: Yes.

THE COURT: -- and you say stay there because the evidence is not sufficient to say how many Blacks have been disenfranchised that would subtract from that Black voting population, and then the plaintiffs contend, well, that's not a real number by starting at 51.1 because, unless you account for those that are not in the Black voting-age population, you truly don't get to a number that is accurate that would put you at a place where, indeed, it is not a majority minority Black? Is that right?

MR. WALLACE: I think we start from the same place. We disagree about how far down from that place we go. And as

to whether being a black majority district -- if it's not a Black majority -- if it is already a black majority district, does that preclude relief? That was my first argument this morning, and you heard it.

MR. SAVITZKY: And, Your Honor, I would --

THE COURT: Yes, please. Uh-huh.

MR. SAVITZKY: Just to address that point.

I agree that there is a disagreement on the law on this question, and I think we made our argument as well. As I understand the law -- we've argued the law. We put it in our findings of fact, our conclusions of law as well -- there's no legal requirement or barrier about the existing district, the district that's currently there, having more or less than 50 percent Black voting-age population no matter what metric you use. It doesn't matter for purposes of Section 2.

What matters is whether Black voters are able to elect candidates of choice or whether they are usually defeated; right? So you could have a situation where the Black voting-age population is way over 50 percent, but because of the circumstances, Black voters are not able to elect candidates of choice. And in -- in that case, there could be a Section 2 problem, a vote dilution problem.

THE COURT: Okay. When I get to totality of the circumstances?

MR. SAVITZKY: Yes.

So the other point, though, is, I think there are two different places to start here. And there's a difference between the census and the ACS; right? There's the census, which is the complete count. Every ten years we actually count the population; right? Those are the actual census numbers. This is not a black majority district using those numbers.

And I would cite the Court just to *Georgia Against Ashcroft,* 539 U.S. 461. It talks about the use of the -- an any part Black census metric to measure Black population. So there's a 49.3. It's not a 50 percent Black district using those numbers. I think, again, it's stipulated, if you use that CVAP estimate of the ACS, which is an estimate, it's 51.

And then I agree we have a debate, based on the evidence, about how far down that number goes once you are trying to think about, well, who is actually eligible? Not just who's eligible because of citizenship but who's eligible because of disenfranchisement.

THE COURT: Right. I understand. Okay.

So incumbency is part of the senate factor analysis. Multiple cases have referenced it and considered it in a legislative redistricting case. It isn't too difficult to figure out how incumbents would be impacted if the lines were shifted and if you would have two incumbents facing off.

Isn't it a little tougher in this case to analyze how a potential line would infect or affect those incumbents? Any

thoughts?

MR. WALLACE: You may proceed.

MR. SAVITZKY: Thank you, Counsel.

So, Your Honor, I think incumbency can come into play. Primarily, I think it comes into play in *Gingles* 1 right when you're evaluating the reasonableness of the plan; so before you sort of get to the totality, when you are looking at the plan offered by the plaintiffs and you think about the different factors.

And it can come into play more often in, like, a state legislative plan where there are potential pairings of incumbents and where there's evidence that the -- that the state map drawers considered incumbency because they're redrawing the lines every ten years and they have different incumbents and different concerns. So that can come up as a real consideration.

So I think, in this case, it's less of an issue. It's not clear -- there wasn't any testimony on whether incumbency is considered in these lines. And, obviously, it's a three-district system made up of county lines. And we've shown many different ways to draw the districts. I'm not sure any incumbents would be paired, which is usually the thing that you think about. But, certainly, there are so many different configurations that are made available that I don't think that would be any impediment.

THE COURT: So you don't think the fact that there are three places in each district, yet the judge doesn't have to come -- I think I'm right about this, and I may be wrong -- the judge doesn't have to reside within that place; right?

MR. SAVITZKY: They're at-large districts.

THE COURT: Yes.

MR. SAVITZKY: So in District 1, for example, you can live in Neshoba County or you can live in Tunica County, anywhere in the district. So there's no -- the places only designate that they are elected sort of at different times.

THE COURT: Okay.

MR. WALLACE: Incumbency comes into play in two ways. One is in determining who usually wins elections. And you've heard that incumbency is a -- is an advantage. And as you look at the Earle Banks's election, one problem he had was he was running against an incumbent who was particularly popular with Black voters. That's one way incumbency comes into the case.

The other way incumbency comes into the case is how you draw the lines if you decide to draw lines, and it is usually the case that, when the legislature draws lines, it works very hard to give every incumbent a place where they don't have to run against somebody else.

And, of course, that's the problem with Illustrative Plan 1. It takes Justice Kenny Griffis in Rankin County and makes him run against three justices who already have a job in

the Southern District.

So those are the two ways incumbency comes into this case.

THE COURT: Okay.

MR. SAVITZKY: And, Your Honor, just briefly on this point.

No dispute that on the totality of the circumstances this sort of broader concept of incumbency and how it comes into play in terms of the opportunity of Black voters to elect candidates in the district would be something to consider. And, obviously, we would submit that the fact that the only Black justices who have sat on the Court are folks who have been appointed and achieved incumbency first through the appointment of the governor is one important consideration.

On the districting point in particular, I think this is also a different situation only because these elections happen every eight years. They're relatively infrequent. But, again, I think it's for the legislature, if there's a liability finding, to figure out how to draw these lines. We don't have evidence that that's something that actually is considered when you put these lines together, but the legislature would have that opportunity.

And, of course, you look at the least-change plans, for example, and only seven counties are moved around. You can look at the Delta. Rankin, Madison, Hinds all stay in there.

East/west is maintained. So there are many different ways to draw a true black majority district here. And I don't think there is any reason to think that the legislature couldn't take incumbency into account, if it wanted to, after a liability finding.

THE COURT: Okay. So I want to ask you a question about Senate Factor 8. You know, we've heard a lot about whether elected officials are unresponsive to the minority's particularized needs. And I've heard a lot about, well, what is the supreme court going to do about that need?

So this goes, I think, in large part, to the -- I guess this is where I am right now, is an acknowledgement that it's hard for the supreme court to recognize -- or to respond to a particular need if that is Medicaid, unless they're ruling on a Medicaid decision. Okay?

Is it -- is there any other way to even talk about that other than just maintaining judicial independence? That we don't need supreme court justices that respond to particularized needs. We need supreme court justices that are fair, that take all facts into consideration. Is there any other way for me to look at that? And if so, tell me.

MR. SAVITZKY: Yes, Your Honor.

And I actually do think -- you know, what Senate Factor 8 is getting at is it's one way to think about the political process and the extent to which racial division

affects the political process and makes the political playing field unequal. So it goes to the larger political context. It's not about the responsiveness of the particular body whose lines are being challenged. I think that's an important distinction.

So I think you can. And there is some evidence in the record about the extent to which the supreme court could be responsive to some of the particularized needs of Black voters. But the broader point is that the responsiveness of policymakers who have more discretion, like legislators, is actually highly relevant. And that's the primary evidence that the Court can look to in evaluating that. Because the question isn't is this particular body nonresponsive. The question is do these lines result in unequal opportunities and to consider that when you look at the entire political context.

So the responsiveness of those policymakers with discretion tells about the political context. It tells us about whether officials respond to Black voters and Black constituents when they reach out. And I would submit that the evidence here and the testimony from individual witnesses is that too often that does not happen.

MR. WALLACE: I think we have a historical agreement on this one because I was born before 1987, and I remember the cases in the '60s where federal courts tried to deal directly with the problem of nonresponsiveness.

In Mississippi, the streets would stop being paved when you got to the Black neighborhoods. The White neighborhoods had sewers. The Black neighborhoods didn't. Those cases would wind up in court, and federal judges would have to be, you know, municipal planners to tell people what to do.

And I think part of the problem that led to *Zimmer* saying break up these at-large city governments and make sure Black folks get representation was the thought that, if you've got Black representation, they could stand up and say, "Get me a sewer," and you wouldn't have to come to court. So that logic makes sense when you're dealing with a representative body. You know, you want representatives to represent people who have real needs and do that effectively, and that's where -- that's where responsiveness comes in.

The supreme court doesn't do any of that. The supreme court isn't passing Medicaid. It isn't paving sidewalks. Its job is to ignore all of that and to enforce the law. And so I don't think what's going on in the representative bodies, good, bad, or indifferent, has any effect on what you ought to decide about the supreme court.

THE COURT: And I do acknowledge -- and somebody said it. And it's been said many times before -- that, you know, we all come from different places. So from whence you came gives you better insight as to, you know, what those -- that

particular group's needs may be.

Okay. Let's talk about core retention. Dr. Swanson testified about the core retention numbers with respect to Cooper's plan and the least-change plans too.

Didn't the supreme court indicate that core retention has limited or no weight in *Allen*?

MR. WALLACE: I wouldn't say no weight, but I would agree limited. We're not trying to tell you that this is a huge factor on liability, but it is a practical factor. That as you consider whether we need any kind of remedy at all, think of the disruption that it will cause in order to increase the Black population in District 1 by about 40,000 people.

The first thing Plan 1 does is take 80,000 people out. So they've got to bring 120,000 Black folks in. Seems to me you ought -- it's almost like *Clements* says. You ought to have a pretty substantial problem before you start disrupting people to that extent.

But I absolutely agree the *Allen* case says it ain't a big deal.

MR. SAVITZKY: And I don't know if you need to hear much more about it. I mean, often there are -- there are states where core retention is not taken into account. I think, in a legislative context, when you have a new plan and you have an alternative plan, you look which one sort of matches up to the old plan more. That's the situation we see

core retention potentially being used.

But in a situation where the lines haven't been changed in 40 years, I would submit it has really no relevance at all. As soon as you change the lines, then you're going to change the lines. So there isn't anything to compare it to.

But I would also say, and the evidence was, the vast majority of Mississippians would stay in their existing supreme court districts under any of these plans. I mean, under the least-change plans, it's well over 90 percent, but even on Plan 1, 75 percent of Mississippians stay in their same district.

THE COURT: Okay. So I've heard about Justice Kavanaugh's concurrence in *Milligan,* that a court must first find that the districts, as legislatively drawn, combined or divided the Black population. The Southern District, in its case a few months ago, rejected this argument. Tell me what's incorrect about what the Southern District did.

Mr. Wallace, you may go first.

MR. WALLACE: Well, I told you that in my brief, Your Honor, if I remember correctly. I think I -- you know, we had the brief almost written when the case came down. And I think I have a footnote about it -- a long footnote on page 9 if you want to go back and read it.

THE COURT: Okay.

MR. WALLACE: But the short answer is the three judges

said, "Well, he agreed with the other four justices on how to apply *Gingles* point 1, and so there's no change." And -- well, he did agree with them on how to apply it, but I think that the -- I think that the concurrence -- because, remember, I mean, there's a part of the opinion he didn't join. He had some reason not to join the opinion.

And I think his concurrent says, "You get to *Gingles* 1 when you need a remedy for cracking and packing." And that, I believe -- to the extent that the three-judge court said there was no difference at all, I think they missed it.

I will say one other thing while I'm standing up. Everybody at both of these tables hopes that the legislature settles that problem, but...

THE COURT: I bet so.

MR. WALLACE: And we hope they settle your problem when we get to that point, but there're never any guarantee of that; so...

THE COURT: Right.

MR. SAVITZKY: And, Your Honor, just briefly on that point.

We do think the three-judge court got it right. Let's be very clear that Justice Kavanaugh joined the entirety of *Milligan* with the exception of one subsection of one section, including -- and *Milligan* was primarily about *Gingles* 1. I mean, the Court reaffirmed the entire standard, but it was very

focused on *Gingles* 1. And Justice Kavanaugh joined on, more or less, the entirety of that opinion, including the Court's statement of the basic parameters in *Gingles 1* that we're looking at. Are the illustrative plans reasonably configured looking at traditional districting principles?

So -- and in terms of his concurrence -- and we cited the Court. I think it's page 44, Footnote 2 of Justice Kavanaugh's -- of Justice Kavanaugh's concurring opinion. But he points out, in terms of evaluating an illustrative plan, maintaining county lines, using county lines -- in this case, we have plans that are drawn -- whole county lines is -- is a strong indicator you have reasonable plans that are well-configured.

So we think the panel got that one right and wouldn't read anything more into the concurrence other than Justice Kavanaugh explaining some of his additional thoughts.

And, again, cracking, we have evidence of that here. I mean, that's what this case is about.

THE COURT: Plaintiffs, in your amended complaint, you do not request that this Court implement the plan -- and we've talked about that -- to create the district. I want to be sure that I understand the relief requested is that I simply decide the -- as y'all refer to it, the liability part of this to find that the present plan violates the Voting Rights Act and then direct the appropriate authorities to redraw, if you succeed?

MR. SAVITZKY: Yes, Your Honor. That's correct. And that -- that is the process.

I mean, I think there have been -- especially not as often these days, but in the past, there have been instances where a districting plan is challenged, and there's a liability determination, and the legislature chooses not to act. And, eventually, the Court who decided the case has to appoint a special master to engage in the process. But the legislature always gets the first shot.

It is in the Court's discretion how to -- how much time to allow or how that process will play out, but it's the legislature's job to draw district lines in the first instance. So we're looking for a liability finding, and then, hopefully, the legislature would draw a plan that would comport with the Court's ruling, and that would be the end of it.

MR. WALLACE: That's correct. And just to be clear, Your Honor, you will retain jurisdiction in case the legislature doesn't fix it. If it doesn't happen, it comes back to you.

THE COURT: And on that point, I join with you and hope that the legislature solves the problem.

I just want to make a couple of observations, before we quit for the day, in the two-week period that we have had. I want all of you lawyers to understand that all through the last two weeks we've had several law clerks in and out and

hearing some of the testimony, and I am so proud that they have had the opportunity to hear such good counselors of the law argue such an important case.

So it's been -- it's been good that in this courtroom those law clerks have had the opportunity to hear you make argument in this case as well as hear the testimony of these very, very important witnesses.

There's a lot of political might in this courtroom, and I'm going to ask -- Mr. Wallace, I'm going to pick on you and say, could you get this law changed to where this too is a three-judge panel decision?

MR. WALLACE: I'll be honest with you, Your Honor, we thought about it.

First of all, generally, the judiciary hates three-judge panels, especially the Court of Appeals hates three-judge panels, and they've gone to Congress to get rid of as many of them as they possibly can.

You know, an argument can be made -- we decided not to make -- that this will control the commissioners who are legislative bodies, and we should have asked for a three-judge panel, and we decided it would be a whole lot simpler with one judge than with three judges.

Now, knowing your pleasure, if we do this again, we'll see if we can get you some help.

THE COURT: Well, I am joking with you, but truly just

went for some months just assuming it would be a three-judge panel until I at some point realized, no, Sharion, this is you. And so there may be some -- after -- after the decision, there may be some effort on everybody's part to say, well, we need three judges instead of one making these decisions.

But I want to thank you, thank you for your excellent preparation and work in this case, and to doing -- for doing your very best to prepare me to make a decision. So I've enjoyed having you in the courtroom over the last two weeks.

You are dismissed.

MR. SAVITZKY: Thank you, Your Honor.

MR. SHANNON: Thank you, Your Honor.

(CONCLUDED AT 1:32 P.M.)

CERTIFICATE

I, Phyllis K. McLarty, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of Mississippi, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing pages, 1419-1580, Volume 8, are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Witness my hand, this 3rd day of September, 2024.

/s/ Phyllis K. McLarty
PHYLLIS K. McLARTY, RMR, FCRR, CCR #1235
Federal Official Court Reporter